

Legal Developments

ORDERS ISSUED UNDER BANK HOLDING COMPANY ACT

Orders Issued Under Section 4 of the Bank Holding Company Act

J.P. Morgan Chase & Co.
New York, New York

Order Approving Acquisition of a Savings Association

J.P. Morgan Chase & Co. ("Morgan Chase"), a financial holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval to acquire all the voting shares of Chase FSB, Newark, Delaware, a *de novo* federal savings bank, pursuant to section 4(c)(8) and 4(j) of the Bank Holding Company Act (12 U.S.C. §1843(c)(8) and 1843(j)) ("BHC Act") and section 225.24 of the Board's Regulation Y (12 C.F.R. 225.24).¹

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (68 *Federal Register* 68,925 (2003)), and the time for filing comments has expired. The Board has considered the proposal and all comments received in light of the factors set forth in section 4 of the BHC Act.

Morgan Chase, with total consolidated assets of \$771 billion, is the second largest banking organization in the United States.² Morgan Chase controls \$194.5 billion in deposits in depository institutions nationwide, representing approximately 4 percent of the total deposits in insured depository institutions in the United States.³ Morgan Chase proposes to operate Chase FSB as a direct subsidiary that will market and originate certain retail and consumer finance products currently offered by other Morgan Chase subsidiaries. Morgan Chase has represented that it intends for Chase FSB to principally serve the national market, which Morgan Chase describes as the United States outside the tristate area of New York, New Jersey, and Connecticut. Morgan Chase would continue to serve its retail

banking customers in the tri-state area principally through JPMorgan Chase Bank, New York, New York ("JPMCB"), Morgan Chase's lead subsidiary bank. Chase FSB's activities would initially focus on home mortgage lending, marketing of credit cards, and automotive finance.⁴ To facilitate these activities, 302 offices throughout the United States of Chase Manhattan Mortgage Corporation, Edison, New Jersey ("CMMC"), which is Morgan Chase's principal mortgage lending subsidiary, would become offices of Chase FSB.⁵

The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.⁶ The Board is required to review each proposal by a bank holding company to acquire a savings association.⁷ In reviewing the proposal, the Board is required by section 4(j)(2)(A) of the BHC Act to determine that the acquisition of Chase FSB by Morgan Chase "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."⁸ As part of its evaluation of a proposal under these public interest factors, the Board reviews the financial and managerial resources of the companies involved as well as the effect of the proposal on competition in the relevant markets.⁹ In acting on notices to acquire a savings association, the Board also reviews the records of performance of the relevant insured depository institutions under the Community Reinvestment Act (12 U.S.C. § 2901 *et seq.*) ("CRA").¹⁰

Competitive Considerations

As part of its consideration of the public interest factors under section 4 of the BHC Act, the Board has considered

1. Morgan Chase has previously received the required approvals to establish Chase FSB from the Office of Thrift Supervision ("OTS") on November 28, 2003, and from the Federal Deposit Insurance Corporation on December 3, 2003.

2. Asset data for Morgan Chase are as of December 31, 2003, and nationwide ranking data are as of September 30, 2003.

3. Deposit data are as of September 30, 2003. In this context, depository institutions include commercial banks, savings banks, and savings associations.

4. Chase FSB will market credit cards issued by Chase Manhattan Bank USA, N.A., Newark, Delaware ("Chase USA"), which currently issues all Morgan Chase credit cards. Chase USA's automotive finance business will be transferred to Chase FSB.

5. Of these 302 offices, 19 will be administrative offices not open to the public. The remainder will be loan production offices of Chase FSB.

6. 12 C.F.R. 225.28(b)(4)(ii).

7. 12 U.S.C. § 1843(j) and 1843(k)(6)(B).

8. 12 U.S.C. § 1843(j)(2)(A).

9. 12 C.F.R. 225.26.

10. See, e.g., *Banc One Corporation, Inc.*, 83 *Federal Reserve Bulletin* 602 (1997).

carefully the competitive effects of the proposal in the relevant markets in light of all the facts of record. The proposal involves the formation of a *de novo* savings association that would operate nationwide.

Commencement of activities *de novo* is presumed under Regulation Y to result in benefits to the public through increased competition in the market for banking and similar services.¹¹ The proposed acquisition would have no adverse effect on the concentration of banking resources in any relevant banking market. Moreover, the Board has received no objections to the proposal from the Department of Justice or any federal banking agency. In light of all the facts of record, the Board concludes that consummation of the proposed transaction would not result in a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market, and that competitive factors are consistent with approval.

Financial and Managerial Factors

In reviewing the proposal under section 4 of the BHC Act, the Board also has carefully reviewed the financial and managerial resources of Morgan Chase and Chase FSB. The Board has reviewed these factors in light of all the facts of record, including confidential reports of examination assessing the financial and managerial resources of Morgan Chase and its subsidiary banks, information provided by Morgan Chase, and public comments on the proposal.¹² In addition, the Board has consulted with the OTS, which will be the primary federal regulator of Chase FSB. The Board notes that Morgan Chase and its subsidiary depository institutions currently are well capitalized and are expected to remain so after consummation of the proposal. Chase FSB also would be well capitalized at consummation. Based on all the facts of record, the Board concludes that the financial and managerial resources of the institutions involved are consistent with approval of the proposal.¹³

11. See 12 C.F.R. 225.26(c).

12. A commenter opposing the proposal cited press reports of Morgan Chase's connection to investigations, lawsuits, and settlements relating to Enron Corp. and asserted that these issues reflected unfavorably on the managerial resources of JPMCB. The commenter also provided press reports of litigation involving the acquisition of a small number of mortgage loans from a mortgage broker by CMMC and asserted that Morgan Chase and CMMC lacked adequate policies and procedures for monitoring the acquisition of loans on the secondary market. The Board previously has considered these comments in the context of a recent application by JPMCB to acquire trust deposits from subsidiary banks of Bank One Corporation, Chicago, Illinois, and hereby adopts the findings in that case. See *JPMorgan Chase Bank*, 89 *Federal Reserve Bulletin* 511, 512 (2003) ("*JPMCB/Bank One Order*").

In addition, the commenter raised concerns about an investigation by the Oregon Department of Justice ("*Oregon DOJ*") into the alleged use by borrowers of fraudulent Social Security numbers in three mortgage loans underwritten by CMMC. By a letter dated June 10, 2003, to CMMC, the Oregon DOJ closed its inquiry into this matter due to "insufficient evidence."

13. After consulting with the OTS and reviewing all the facts of record, including in particular its approval of Morgan Chase's applica-

Records of Performance Under the Community Reinvestment Act

As previously noted, the Board reviews the records of performance under the CRA of the relevant insured depository institutions when acting on a notice to acquire any insured depository institution, including a savings association. The CRA requires the Board to assess each insured depository institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the institution's safe and sound operation, and to take this record into account in evaluating bank holding company notices.¹⁴

The Board has carefully considered the CRA performance records of each subsidiary insured depository institution of Morgan Chase in light of all the facts of record, including public comments on the proposal. A commenter opposing the proposal has alleged, based on data reported under the Home Mortgage Disclosure Act ("*HMDA*"),¹⁵ that CMMC denied home mortgage loan applications from minorities more frequently than it denied applications from nonminorities in certain Metropolitan Statistical Areas ("*MSAs*").¹⁶

A. CRA Performance Examinations

An institution's most recent CRA performance evaluation is a particularly important consideration in the notice process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate supervisor.¹⁷ JPMCB and Chase USA have each received "Outstanding" ratings from their respective regulators at their most recent examinations for CRA performance.¹⁸ Examiners commended the community development lending of both JPMCB and Chase USA. JPMCB was also found to have an excellent level of qualified investments and to be a leader in providing community development services. Examiners also

tion to form Chase FSB (OTS Order No. 2003-60 (Nov. 28, 2003)), the Board also has determined that, on consummation of the proposal, Chase FSB would be well managed for purposes of section 4(l) of the BHC Act (12 U.S.C. § 1843(l)).

14. 12 U.S.C. § 2903.

15. 12 U.S.C. § 2801 *et seq.*

16. The commenter expressed concern that the formation of Chase FSB would permit Morgan Chase to transfer its retail lending operations to an OTS-regulated institution with the result that consumer protection laws of the individual states would be preempted. As noted above, bank holding companies are permitted by law to own and control federal savings associations. 12 C.F.R. 225.28(b)(4)(ii). The applicability of state laws to federal savings associations is a matter within the jurisdiction of the OTS to determine.

The commenter also alleged that CMMC's purchase of certain mortgage loans on the secondary market enabled predatory lending by an unaffiliated consumer lender. The Board previously considered the remedial steps taken by CMMC in this matter and hereby adopts its conclusions in that case. See *JPMCB/Bank One Order* at 512.

17. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001).

18. Ratings as of November 12, 2001, by the New York State Banking Department and March 3, 2003, by the Office of the Comptroller of the Currency, respectively.

praised Chase USA's flexible loan programs and found it to be very responsive to the credit and community development needs of its assessment area.

The record of Morgan Chase in operating these insured depository institutions indicates that it has the experience and expertise to establish and implement appropriate CRA policies and programs at Chase FSB. The OTS will evaluate Chase FSB's record of CRA-related lending based on its actual lending performance after Chase FSB opens for business. Chase FSB intends to invest in funds that develop low-income residential rental properties in states where it is a major mortgage lender and to seek community development service opportunities in its assessment area.¹⁹ Chase FSB also intends to provide grants to community development organizations in its assessment area and to large regional and national organizations that are active in Chase FSB's top national markets.

B. HMDA Data and Fair Lending Record

The Board has carefully considered the lending records and HMDA data of JPMCB, CMMC, and Chase USA in light of the comments received.²⁰ Based on 2002 HMDA data, the commenter alleged that CMMC disproportionately excluded or denied African-American and Hispanic applicants for home mortgage loans in various MSAs in twelve states and the District of Columbia.²¹ The commenter asserted that CMMC's denial rates for minority applicants were higher than the rate for nonminority applicants, and that CMMC's denial disparity ratios compared unfavorably with those ratios for the aggregate of lenders in the MSAs.²² In the *JPMCB/Bank One Order*, the Board considered substantially similar comments about Morgan Chase's HMDA data for MSAs in eight of these states and the District of Columbia, and the Board's analysis of Morgan Chase's HMDA data in that order is incorporated by reference.²³

19. In approving Morgan Chase's application to organize Chase FSB, the OTS concluded that Chase FSB has satisfactorily demonstrated that it will meet its CRA objectives. OTS Order No. 2003-60 (Nov. 28, 2003).

20. The Board has reviewed HMDA data reported by JPMCB, CMMC, and Chase USA in 2001 and 2002 in the markets of concern to the commenter. The Board included data submitted by Chase USA in its review because, as noted above, Chase USA was the parent of CMMC until March 2002. CMMC is now a subsidiary of JPMCB.

21. In response, JPMCB noted that the commenter's analysis was based on data from only a few MSAs and included only conventional home purchase loans originated by CMMC in 2002, and that the sample, therefore, was too small to represent JPMCB's overall mortgage lending performance.

22. The denial disparity ratio equals the denial rate for a particular racial category (for example, African American) divided by the denial rate for whites.

23. The MSAs reviewed by the Board in the *JPMCB/Bank One Order* were Benton Harbor and Detroit, both in Michigan; Boston, Massachusetts; Dallas, Texas; Memphis, Tennessee; Raleigh, North Carolina; Richmond, Virginia; San Francisco, California; St. Louis, Missouri; and Washington, DC. The new MSAs reviewed in connection with this order are Denver, Colorado; Jackson, Mississippi; Portland, Oregon; and Seattle, Washington.

For the MSAs cited by the commenter in Colorado, Mississippi, Oregon, and Washington, the denial disparity ratios reflected in the 2002 HMDA data reported by JPMCB, CMMC, and Chase USA generally were more favorable than or comparable with the ratios reported by the aggregate of lenders in three of the four markets reviewed. The denial disparity ratio approximated, but was somewhat less favorable than, the ratio for the aggregate in the Portland MSA for African Americans.

The HMDA data do not indicate that JPMCB, CMMC, or Chase USA has excluded any segment of the population or any geographic area on a prohibited basis. The Board, nevertheless, is concerned when the record of an institution indicates disparities in lending and believes that all banks are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending, but also equal access to credit by creditworthy applicants regardless of race or income level. The Board recognizes, however, that HMDA data alone provide an incomplete measure of an institution's lending in its community because these data cover only a few categories of housing-related lending. HMDA data, moreover, provide only limited information about covered loans.²⁴ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted adequately in meeting its community's credit needs or has engaged in illegal lending discrimination.

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by JPMCB and its predecessor bank, Chase Manhattan Bank, New York, New York.²⁵ Examiners found no evidence of prohibited discrimination or other illegal credit practices at JPMCB, Chase Manhattan Bank, Chase USA, or CMMC.

As noted in the *JPMCB/Bank One Order*, JPMCB and CMMC have taken several affirmative steps to ensure compliance with fair lending laws. Management at JPMCB and CMMC conduct comparative file reviews for most of their loan products. JPMCB and CMMC have a secondary review process that includes regression analysis of all applications to identify possible instances or indications of disparate treatment, and JPMCB indicated that it acts promptly to correct inappropriate underwriting decisions that are identified, including sending offers of credit to individuals whose applications were denied in error. In addition, an independent review team, under the direction

24. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

25. JPMCB was formed in the fourth quarter of 2001 by the merger of Chase Manhattan Bank and Morgan Guaranty Trust Company. The CRA performance of Chase Manhattan Bank was last evaluated by the Federal Reserve Bank of New York as of July 9, 2001.

of the fair lending unit, reviews applications identified by the regression analysis and reports its findings to the audit department quarterly.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of JPMCB, Chase Manhattan Bank, and Chase USA. The Board concludes that, in light of the entire record, the HMDA data indicate that JPMCB's record of performance in helping to serve the credit needs of its community is consistent with approval of the proposal.

C. Conclusion on CRA Performance Records

The Board has carefully considered all the facts of record, including reports of examination of CRA records of the institutions involved, information provided by Morgan Chase, all comments received and responses to the comments, and confidential supervisory information. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that the CRA performance records of the institutions involved are consistent with approval.

Other Considerations

As part of its evaluation of the public interest factors, the Board also has carefully reviewed the public benefits and possible adverse effects of the proposal. The record indicates that consummation of the proposal would result in benefits to consumers and businesses. The proposal would enable Morgan Chase to streamline the way in which it provides consumer finance products and services to customers throughout the national market, by creating a single institution through which customers can obtain home and automobile financing and credit card products and services now offered by different Morgan Chase affiliates. Morgan Chase expects that additional retail products and services will eventually also be offered in the national market through Chase FSB. Based on all the facts of record, the Board has determined that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects under the standard of section 4(j)(2) of the BHC Act.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the notice should be, and hereby is, approved. The Board's approval is specifically conditioned on compliance by Morgan Chase with all the commitments made in connection with the notice and all the conditions in this order. The Board's determination also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c) (12 C.F.R. 225.7 and 225.25(c)), and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to

prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders thereunder. For purposes of this action, the commitments and conditions relied on by the Board in reaching its decision are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The proposal may not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of New York, acting pursuant to delegated authority.

By order of the Board of Governors, effective January 30, 2004.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

UBS AG
Zurich, Switzerland

Order Approving Notice to Engage in Activities Complementary to a Financial Activity

UBS AG ("UBS"), a foreign bank that is treated as a financial holding company ("FHC") for purposes of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 4 of the BHC Act (12 U.S.C. § 1843) and the Board's Regulation Y (12 C.F.R. Part 225) to retain all the voting shares of UBSW Energy LLC, Stamford, Connecticut ("UBS Energy"), and to continue to engage in physical commodity trading in the United States. UBS currently conducts physical commodity trading in the United States pursuant to temporary grandfather authority provided by the BHC Act and Regulation Y.¹

Regulation Y currently authorizes bank holding companies ("BHCs") to engage as principal in derivative contracts based on financial and nonfinancial assets ("Commodity Derivatives"). Under Regulation Y, a BHC may conduct Commodity Derivatives activities subject to certain restrictions that are designed to limit the BHC's activity to trading and investing in financial instruments rather than dealing directly in physical nonfinancial commodities. Under these restrictions, a BHC generally is not allowed to take or make delivery of nonfinancial commodities underlying Commodity Derivatives. In addition, BHCs generally are not permitted to purchase or sell nonfinancial commodities in the spot market.

The BHC Act, as amended by the Gramm-Leach-Bliley Act ("GLB Act"), permits a BHC to engage in activities that the Board had determined were closely related to banking, by regulation or order, prior to November 12,

1. UBS's grandfather rights expire on February 8, 2004. UBS conducts its U.S. energy trading business through UBSW Energy and UBS's London branch.

1999.² The BHC Act permits a FHC to engage in a broad range of activities that are defined in the statute to be financial in nature.³ Moreover, the BHC Act allows FHCs to engage in any activity that the Board determines, in consultation with the Secretary of the Treasury, to be financial in nature or incidental to a financial activity.⁴

In addition, the BHC Act permits FHCs to engage in any activity that the Board (in its sole discretion) determines is complementary to a financial activity and does not pose a substantial risk to the safety or soundness of depository institutions or the financial system generally.⁵ This authority is intended to allow the Board to permit FHCs to engage on a limited basis in an activity that appears to be commercial rather than financial in nature, but that is meaningfully connected to a financial activity such that it complements the financial activity.⁶ The BHC Act provides that any FHC seeking to engage in a complementary activity must obtain the Board's prior approval under section 4(j) of the BHC Act.⁷

UBS has requested that the Board permit it to purchase and sell physical commodities in the spot market and to take and make delivery of physical commodities to settle Commodity Derivatives ("Commodity Trading Activities"). The Board previously has determined that Commodity Trading Activities involving a particular commodity complement the financial activity of engaging regularly as principal in BHC-permissible Commodity Derivatives based on that commodity.⁸ UBS regularly engages as principal in BHC-permissible Commodity Derivatives based on a variety of commodities, including natural gas and electricity. Based on the foregoing and all other facts of record, the Board believes that Commodity Trading Activities are complementary to the Commodity Derivatives activities of UBS.

In order to authorize UBS to engage in Commodity Trading Activities as a complementary activity under the GLB Act, the Board also must determine that the activities do not pose a substantial risk to the safety or soundness of depository institutions or the U.S. financial system generally.⁹ In addition, the Board must determine that the performance of Commodity Trading Activities by UBS "can reasonably be expected to produce benefits to the public,

such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."¹⁰

Approval of the proposal likely would benefit UBS's customers by enhancing the ability of the bank to provide efficiently a full range of commodity-related services. Approving Commodity Trading Activities for UBS also would enable the company to improve its understanding of physical commodity and commodity derivatives markets and its ability to serve as an effective competitor in physical commodity and commodity derivatives markets.

UBS has established and maintains policies for monitoring, measuring, and controlling the credit, market, settlement, reputational, legal, and operational risks involved in its Commodity Trading Activities. These policies address key areas such as counterparty credit risk, value-at-risk methodology and internal limits with respect to commodity trading, new business and new product approvals, and identification of transactions that require higher levels of internal approval. The policies also describe critical internal control elements, such as reporting lines, and the frequency and scope of internal audit of Commodity Trading Activities.

The Board believes that UBS has integrated the risk management of Commodity Trading Activities into the bank's overall risk management framework. Based on the above and all the facts of record, the Board believes that UBS has the managerial expertise and internal control framework to manage adequately the risks of taking and making delivery of physical commodities as proposed.

In order to limit the potential safety and soundness risks of Commodity Trading Activities, as a condition of this order, the market value of commodities held by UBS as a result of Commodity Trading Activities must not exceed 5 percent of UBS's consolidated tier 1 capital (as calculated under its home country standard).¹¹ UBS also must notify the Federal Reserve Bank of New York if the market value of commodities held by UBS as a result of its Commodity Trading Activities exceeds 4 percent of its tier 1 capital.

In addition, UBS may take and make delivery only of physical commodities for which derivative contracts have been authorized for trading on a U.S. futures exchange by the Commodity Futures Trading Commission ("CFTC") (unless specifically excluded by the Board) or which have been specifically approved by the Board.¹² This require-

2. 12 U.S.C. § 1843(c)(8).

3. The Board determined by regulation before November 12, 1999, that engaging as principal in Commodity Derivatives, subject to certain restrictions, was closely related to banking. Accordingly, engaging as principal in BHC-permissible Commodity Derivatives is a financial activity for purposes of the BHC Act. See 12 U.S.C. § 1843(k)(4)(F).

4. 12 U.S.C. § 1843(k)(1)(A).

5. 12 U.S.C. § 1843(k)(1)(B).

6. See 145 Cong. Rec. H11529 (daily ed. Nov. 4, 1999) (Statement of Chairman Leach) ("It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.").

7. 12 U.S.C. § 1843(j).

8. See *Citigroup Inc.*, 89 *Federal Reserve Bulletin* 508 (2003). For example, Commodity Trading Activities involving all types of crude oil would be complementary to engaging regularly as principal in BHC-permissible Commodity Derivatives based on Brent crude oil.

9. 12 U.S.C. § 1843(k)(1)(B).

10. 12 U.S.C. § 1843(j).

11. UBS would be required to include in this 5 percent limit the market value of any commodities held by UBS as a result of a failure of its reasonable efforts to avoid taking delivery under section 225.28(b)(8)(ii)(B) of Regulation Y.

12. The particular commodity derivative contract that UBS takes to physical settlement need not be exchange-traded, but (in the absence of specific Board approval) futures or options on futures on the commodity underlying the derivative contract must have been authorized for exchange trading by the CFTC.

The CFTC publishes annually a list of the CFTC-authorized commodity contracts. See Commodity Futures Trading Commission,

ment is designed to prevent UBS from becoming involved in dealing in finished goods and other items, such as real estate, that lack the fungibility and liquidity of exchange-traded commodities.

To minimize the exposure of UBS to additional risks, including storage risk, transportation risk, and legal and environmental risks, UBS may not:

- (i) own, operate, or invest in facilities for the extraction, transportation, storage, or distribution of commodities; or
- (ii) process, refine, or otherwise alter commodities. In conducting its Commodity Trading Activities, UBS will be expected to use appropriate storage and transportation facilities owned and operated by third parties.¹³

UBS and its Commodity Trading Activities also remain subject to the general securities, commodities, and energy laws and the rules and regulations (including the anti-fraud and anti-manipulation rules and regulations) of the Securities and Exchange Commission, the CFTC, and the Federal Energy Regulatory Commission.

Permitting UBS to engage in the limited amount and types of Commodity Trading Activities described above, on the terms described in this order, would not appear to pose a substantial risk to UBS, depository institutions, or the U.S. financial system generally. Through its existing authority to engage in Commodity Derivatives, UBS already may incur the price risk associated with commodities. Permitting UBS to buy and sell commodities in the spot market or physically settle Commodity Derivatives would not appear to increase significantly the organization's potential exposure to commodity price risk.

For these reasons, and based on UBS's policies and procedures for monitoring and controlling the risks of Commodity Trading Activities, the Board concludes that consummation of the proposal does not pose a substantial risk to the safety and soundness of depository institutions or the financial system generally and can reasonably be expected to produce benefits to the public that outweigh any potential adverse effects.

Based on all the facts of record, including the representations and commitments made by UBS in connection with the notice, and subject to the terms and conditions set forth in this order, the Board has determined that the notice should be, and hereby is, approved. The Board's determination is subject to all the conditions set forth in Regulation Y, including those in section 225.7 (12 C.F.R. 225.7), and to the Board's authority to require modification or

termination of the activities of a BHC or any of its subsidiaries as the Board finds necessary to ensure compliance with, or to prevent evasion of, the provisions and purposes of the BHC Act and the Board's regulations and orders issued thereunder. The Board's decision is specifically conditioned on compliance with all the commitments made in connection with the notice, including the commitments and conditions discussed in this order. The commitments and conditions relied on in reaching this decision shall be deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

By order of the Board of Governors, effective January 27, 2004.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Orders Issued Under Sections 3 and 4 of the Bank Holding Company Act

Bank of America Corporation
Charlotte, North Carolina

FleetBoston Financial Corporation
Boston, Massachusetts

Order Approving the Merger of Bank Holding Companies

Bank of America Corporation, Charlotte, North Carolina ("Bank of America"), a financial holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act (12 U.S.C. § 1842) to merge with FleetBoston Financial Corporation, Boston, Massachusetts ("FleetBoston"), and to acquire FleetBoston's subsidiary banks, Fleet National Bank, Providence, Rhode Island ("Fleet Bank"), and Fleet Maine, National Association, South Portland, Maine ("Fleet Maine").¹ Bank of America also has filed notices under section 4(c)(13) of the BHC Act (12 U.S.C. § 1843(c)(13)), sections 25 and 25A of the Federal Reserve Act (12 U.S.C. §§ 601 *et seq.* and 611 *et seq.*), and the Board's Regulation K (12 C.F.R. 211) to acquire certain foreign operations and the Edge Act subsidiaries of FleetBoston.²

FY 2002 Annual Report to Congress 124. With respect to granularity, the Board intends this requirement to permit Commodity Trading Activities involving all types of a listed commodity. For example, Commodity Trading Activities involving any type of coal or coal derivative contract would be permitted, even though the CFTC has authorized only Central Appalachian coal.

13. Approving Commodity Trading Activities as a complementary activity, subject to limits and conditions, would not in any way restrict the existing authority of UBS to deal in foreign exchange, precious metals, or any other bank-eligible commodity.

1. Bank of America also proposes to acquire the nonbanking subsidiaries of FleetBoston in accordance with section 4(k) of the BHC Act (12 U.S.C. § 1843(k)), including Fleet Bank (RI), National Association, Providence, Rhode Island ("Fleet Bank (RI)"), a nationally chartered credit card bank that is not considered a "bank" for purposes of the BHC Act.

2. Bank of America and FleetBoston also have requested the Board's approval to hold and exercise an option that allows Bank of America to purchase up to 19.9 percent of FleetBoston's common stock and FleetBoston to purchase up to 19.9 percent of Bank of America's common stock, if certain events occur. Both options would

Bank of America, with total consolidated assets of approximately \$736.5 billion, is the third largest commercial banking organization in the United States, controlling approximately 7.4 percent of total assets of insured banking organizations in the United States.³ Bank of America operates subsidiary depository institutions in 22 states and the District of Columbia, and it engages nationwide in numerous permissible nonbanking activities.

FleetBoston, with total consolidated assets of approximately \$201.5 billion, operates depository institutions in Connecticut, Florida, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island. FleetBoston is the eighth largest commercial banking organization in the United States, controlling approximately 2.2 percent of total assets of insured banking organizations in the United States. It also engages in a broad range of permissible nonbanking activities nationwide.

On consummation of the proposal, Bank of America would become the second largest commercial banking organization in the United States, with total consolidated assets of approximately \$938 billion. The combined organization would operate under the name of Bank of America Corporation and control approximately 9.6 percent of total assets of insured banking organizations in the United States.

Factors Governing Board Review of the Transaction

The BHC Act enumerates the factors the Board must consider when reviewing the merger of bank holding companies or the acquisition of banks. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the transaction; the convenience and needs of the communities to be served, including the records of performance under the Community Reinvestment Act (12 U.S.C. § 2901 *et seq.*) (“CRA”) of the insured depository institutions involved in the transaction; and the availability of information needed to determine and enforce compliance with the BHC Act. In cases involving interstate bank acquisitions, the Board also must consider the concentration of deposits nationwide and in certain individual states, as well as compliance with other provisions of the Riegle–Neal Interstate Banking and Branching Efficiency Act of 1994 (“Riegle–Neal Act”).⁴

Public Comment on the Proposal

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (68 *Federal Register* 65,070, 65,932, and 75,565 (2003)),

and the time for filing comments has expired. The Board extended the initial period for public comment to accommodate the broad public interest in this proposal, providing interested persons more than 60 days to submit written comments.

Because of the extensive public interest in the proposal, the Board held public meetings in Boston, Massachusetts, and San Francisco, California, to provide interested persons an opportunity to present oral testimony on the factors that the Board must review under the BHC Act.⁵ More than 180 people testified at the public meetings, and many of the commenters who testified also submitted written comments.

In total, approximately 2200 individuals and organizations submitted comments on the proposal through oral testimony, written comments, or both.⁶ Comments were submitted by organizations, individuals, and representatives from several states where the companies operate. Commenters included members of Congress, state and local government officials, community groups, nonprofit organizations, customers of Bank of America and FleetBoston, and other interested organizations and individuals. Commenters filed information and expressed views supporting and opposing the merger.

A large number of commenters supported the proposal and commended Bank of America and FleetBoston for their commitment to local communities and for their leadership in community development activities. These commenters praised Bank of America’s and FleetBoston’s records of providing affordable mortgage loans, investments, grants and loans in support of economic and community revitalization projects, and charitable contributions in local communities. Some commenters also noted favorably the small business activities of both organizations, which included lending, educational seminars, and technical assistance. Many of the commenters also praised Bank of America’s nationwide \$750 billion, 10-year community economic development plan (“Community Development Initiative”) and stated that the plan would increase the availability of loans and investments to support community development and affordable housing activities.

A large number of commenters opposed the proposal, requested that the Board approve the proposal subject to certain conditions, expressed concern about some aspect of the CRA performance of Bank of America or FleetBoston, or argued that the proposal might lead to a reduction in banking services in particular communities or regions of the country. Many of these commenters focused on Bank of America’s and FleetBoston’s records of lending to small businesses and minorities and in low- and moderate-income (“LMI”) and rural areas. A number of commenters from New England and other states currently served

expire on consummation of the proposal by Bank of America to merge with FleetBoston.

3. Asset data are as of December 31, 2003, and have been adjusted to account for FleetBoston’s acquisition of Progress Financial Corp., Blue Bell, Pennsylvania (“Progress”), on February 1, 2004. National ranking data are as of September 30, 2003.

4. Pub. L. No. 103-328, 108 Stat. 2338 (1994).

5. The Boston public meeting was held on January 14, 2004, and the San Francisco public meeting was held on January 16, 2004.

6. Comments included 1,400 identical e-mail messages from members of an organization that expressed concerns about whether large bank mergers were good for consumers, 300 identical letters about the alleged involvement of a FleetBoston predecessor in the illegal slave trade, and more than 500 other comments on the proposal.

by FleetBoston expressed concern that Bank of America might not serve the diverse credit needs of their local communities as well or might terminate relationships or programs that FleetBoston has developed to meet the credit needs of its communities, such as FleetBoston's First Community Bank and the FleetBoston Foundation. In addition, many commenters criticized Bank of America's Community Development Initiative, stating that the initiative was not enforceable and did not provide specific lending commitments for individual states or regions or for particular loan products or programs.

Some commenters believed that the merger would reduce competition for banking services, substantially increase concentration in the banking industry, result in the loss of local control over lending and investment decisions, or exceed the nationwide deposit cap in the BHC Act. Other commenters expressed concern about Bank of America's investment in mortgage-backed securities pools that include subprime loans, the potential adverse effects that might result from branch closings, the loss of a major financial institution headquartered in New England, or job losses. Some commenters expressed concerns about Bank of America's or FleetBoston's managerial resources in light of certain lawsuits and investigations involving one or both companies and their securities and mutual fund affiliates.

In evaluating the statutory factors under the BHC Act, the Board carefully considered the information and views presented by all commenters, including the testimony at the public meetings and the information and views submitted in writing. The Board also considered all the information presented in the applications, notices, and supplemental filings by Bank of America and FleetBoston; various reports filed by the relevant companies; publicly available information; and other reports. In addition, the Board reviewed confidential supervisory information, including examination reports on the bank holding companies and the depository institutions involved and information provided by other federal banking agencies, the Securities and Exchange Commission ("SEC"), and the Department of Justice ("DOJ"). After a careful review of all the facts of record, and for the reasons discussed in this order, the Board has concluded that the statutory factors it is required to consider under the BHC Act and other relevant banking statutes are consistent with approval of the proposal.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the bank holding company's home state if certain conditions are met. For purposes of the BHC Act, the home state of Bank of America is North Carolina,⁷ and FleetBoston's sub-

sidary banks are located in Connecticut, Florida, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island.⁸

The Board may not approve an interstate proposal under section 3(d) if the applicant controls, or upon consummation of the proposed transaction would control, more than 10 percent of the total amount of deposits of insured depository institutions in the United States ("nationwide deposit cap"). The nationwide deposit cap was added to section 3(d) when Congress broadly authorized interstate acquisitions by bank holding companies and banks in the Riegle-Neal Act. The intended purpose of the nationwide deposit cap was to help guard against undue concentrations of economic power.⁹ Although the nationwide deposit cap prohibits interstate acquisitions by a company that controls deposits in excess of the cap, it does not prevent a company from exceeding the nationwide deposit cap through internal growth and effective competition for deposits or through acquisitions entirely within the home state of the acquirer.

Several commenters questioned whether the proposed acquisition would violate the nationwide deposit cap and presented differing views on how the deposit cap should be calculated. Some commenters challenged Bank of America's computation of its *pro forma* share of total deposits in the United States provided in the application, suggested that the Board rely on the Summary of Deposits ("SOD") data collected annually by the Federal Deposit Insurance Corporation ("FDIC"), or argued that certain geographies or types of deposits or types of institutions should be excluded from the calculations.

As required by section 3(d), the Board has carefully considered whether Bank of America controls, or upon consummation of the proposed transaction would control, a total amount of deposits in excess of the nationwide deposit cap. Not all of the terms used in defining the nationwide deposit cap are specifically defined in the BHC Act. The Federal Deposit Insurance Act ("FDI Act") contains an identical nationwide deposit cap applicable to bank-to-bank mergers, and, consequently, many of the terms used in the nationwide deposit cap in the BHC Act refer to terms or definitions contained in the FDI Act.

In particular, the BHC Act adopts the definition of "insured depository institution" used in the FDI Act. The FDI Act's definition includes all banks (whether or not the institution is a bank for purposes of the BHC Act), savings banks and savings associations that are insured by the FDIC, and insured U.S. branches of foreign banks, as each of those terms is defined in the FDI Act.¹⁰

8. For purposes of the Riegle-Neal Act, the Board considers a bank to be located in the states in which the bank is chartered or headquartered or operates a branch. See 12 U.S.C. §§ 1841(o)(4)-(7) and 1842(d)(1)(A) and (d)(2)(B).

9. See S. Rep. No. 102-167 at 72 (1991).

10. A number of commenters have asserted that deposits held by insured depository institutions in Puerto Rico and the U.S. territories should not be included in the deposit calculation because these areas are not "States." The terms "State" and "United States" are not defined in the BHC Act. The Board believes that the term "United States" include the States, the District of Columbia, Puerto Rico,

7. See 12 U.S.C. § 1842(d). A bank holding company's home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later.

Section 3(d) also specifically adopts the definition of “deposit” in the FDI Act.¹¹ Each insured bank in the United States must report its total deposits in accordance with this definition on the institution’s Consolidated Report of Condition and Income (“Call Report”). Each insured savings association must similarly report its total deposits on the institution’s Thrift Financial Report (“TFR”). Deposit data for FDIC-insured U.S. branches of foreign banks and Federal branches of foreign banks are obtained on the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (“RAL”). These data are reported on a quarterly basis to the FDIC and are publicly available.

The Call Report, TFR, and RAL reflect data based on the FDI Act’s definition of “deposit” and represent the best and most complete data reported by all insured depository institutions in the United States. Consequently, the Board has relied on the data collected in these reports to calculate the total amount of deposits of insured depository institutions in the United States and the total amount of deposits held by Bank of America, both before and upon consummation of the proposed transaction, for purposes of applying the nationwide deposit cap in this case.¹² The

items on the Call Report, TFR, and RAL used to calculate the total amount of deposits of insured depository institutions in the United States are enumerated in Appendix A. These items, combined as explained in Appendix A, conform the data collected on the Call Reports and TFR as closely as possible to the statutory definition of deposits in the FDI Act and BHC Act. The Board has developed this formulation in consultation with the staff of the FDIC, which collects and uses these data for purposes of applying the same definition of deposits for deposit insurance purposes and the nationwide deposit cap in the FDI Act.

Based on the latest Call Report, TFR, and RAL data available for all insured depository institutions, the total amount of deposits of insured depository institutions in the United States is approximately \$5.33 trillion. Also based on the latest Call Report, Bank of America (including all of its insured depository institution affiliates) controls deposits of approximately \$394.8 billion and FleetBoston (including all of its insured depository institution affiliates) controls deposits of approximately \$133.5 billion.¹³ Bank of America, therefore, currently controls approximately 7.4 percent of total U.S. deposits. Upon consummation of the proposed transaction, Bank of America would control approximately 9.904 percent of the total amount of deposits of insured depository institutions in the United States.

Thus, the Board finds that Bank of America does not now control, and upon consummation of the proposed transaction would not control, an amount of deposits that would exceed the nationwide deposit cap.

Section 3(d) also prohibits the Board from approving a proposal if, on consummation of the proposal, the applicant would control 30 percent or more of the total deposits of insured depository institutions in any state in which both the applicant and the organization to be acquired operate an insured depository institution, or such higher or lower percentage that is established by state law.¹⁴ Bank of America would control less than 30 percent, and less than the appropriate percentage established by applicable state law, of total deposits of insured depository institutions in Florida and New York, the states in which Bank of America currently operates a bank or branch and would assume additional deposits on consummation of the proposal.¹⁵ All other requirements of section 3(d) of the BHC Act also would be met after consummation of the pro-

Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, the islands formerly referred to as the Trust Territory of the Pacific Islands, and any territory of the United States. This definition of “United States” is consistent with the purpose of the nationwide deposit cap. All banks operating in these areas are eligible for FDIC deposit insurance and are subject to the jurisdiction of the FDIC in the same manner as other FDIC-insured banks. If these areas are not included in the definition of “United States” for purposes of the nationwide deposit cap, an institution such as Bank of America could expand in these areas without limit, thereby increasing its control of FDIC-insured deposits. This definition is also consistent with the definition of “United States” contained in the Board’s Regulation Y, which governs applications under section 3 of the BHC Act.

11. 12 U.S.C. § 1842(d)(2)(E) (incorporating the definition of “deposit” at 12 U.S.C. § 1813(l)).

12. Some commenters argued that the SOD collected by the FDIC should be used for applying the deposit cap to the proposal. SOD data disclose an institution’s deposits broken out by branch office. However, SOD data are not, and are not intended to be, an exact representation of deposits as defined in the FDI Act. Rather, these data are intended to provide a useful proxy for the size of each institution’s presence in various banking markets primarily for the purpose of conducting examinations and performing competitive analysis in local banking markets. Consequently, SOD data require a variety of adjustments, most of which would be based on Call Report data, if SOD data are to be used to better approximate total deposits as defined in the FDI Act and the BHC Act. Moreover, SOD data are collected only once each year at the end of the second quarter, which means that the most recent SOD data provide an estimation of deposits held by institutions more than eight months ago. Call Report data, on the other hand, are collected each quarter, with the most recent data representing deposits as of December 31, 2003. Given the limitations of SOD data, the Board believes that Call Report data, rather than SOD data, provide a more complete and accurate representation of the amount of deposits held by the institutions involved in this transaction and in all insured depository institutions in the United States as of the date the Board has considered the proposal.

A number of commenters noted the Board’s past use of SOD data in concluding a proposal was within the Riegle–Neal Act’s nationwide deposit cap. See, e.g., *Fleet Financial Corporation*, 85 *Federal Reserve Bulletin* 747 (1999); *NationsBank*, 84 *Federal Reserve*

Bulletin 858, 860 (1998) (“*NationsBank*”). In these proposals, the Board used information from the FDIC’s SOD reports as an approximation of nationwide deposits. To date, the largest concentration of nationwide deposits was approximately 8.1 percent (see *NationsBank*) and the use of SOD data was a sufficient first screen in light of these proposals’ clear compliance with the nationwide deposit cap.

13. FleetBoston’s deposits include approximately \$770 million in deposits held by Progress.

14. 12 U.S.C. § 1842(d)(2)(B)–(D).

15. On consummation, Bank of America would control less than 30 percent of total deposits in insured depository institutions in Florida. See Fla. Stat. ch. 658.295(8)(b) (2003). New York does not have a deposit cap applicable to this proposal, and Bank of America currently does not control an insured depository institution in Connecticut, Massachusetts, Maine, New Hampshire, New Jersey, Pennsylvania, or Rhode Island.

posals.¹⁶ In view of all the facts of record, the Board is permitted to approve the proposal under section 3(d) of the BHC Act.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly. It also prohibits the Board from approving a proposal that would substantially lessen competition in any relevant banking market unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.¹⁷ The Board has carefully considered the competitive effects of the proposal in light of all the facts of record, including public comments on the proposal.

A number of commenters argued that the proposed merger would have adverse competitive effects. Many of these commenters expressed concern that large bank mergers in general, or the proposed merger of Bank of America and FleetBoston in particular, would have adverse effects on competition nationwide. Some commenters also contended that the proposed merger would result in higher fees and costs.

To determine the effect of a proposed transaction on competition, it is necessary to designate the area of effective competition between the parties, which the courts have held is decided by reference to the relevant "line of commerce" or product market and a geographic market. The Board and the courts have consistently recognized that the appropriate product market for analyzing the competitive effects of bank mergers and acquisitions is the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) offered by banking institutions.¹⁸ Several studies support the conclusion that businesses and households continue to seek this cluster of services.¹⁹ Consistent with these precedents and

studies, and on the basis of the facts of record in this case, the Board concludes that the cluster of banking products and services represents the appropriate product market for analyzing the competitive effects of this proposal.

In defining the relevant geographic market, the Board and the courts have consistently held that the geographic market for the cluster of banking products and services is local in nature. The appropriate geographic markets for considering the competitive effects of this proposal are the four local banking markets in which the subsidiary banks of Bank of America and FleetBoston compete directly.²⁰ Bank of America and FleetBoston both operate in the Metropolitan New York–New Jersey banking market, and in the Florida banking markets of West Palm Beach, Fort Pierce, and Sarasota.²¹

The Board has reviewed carefully the competitive effects of the proposal in each of these banking markets in light of all the facts of record. These considerations include the number of competitors that would remain in the markets, the relative share of total deposits in depository institutions controlled by Bank of America and FleetBoston in the markets ("market deposits"),²² the concentration level of market deposits and the increase in this level as measured by the Herfindahl–Hirschman Index ("HHI") under the Department of Justice Merger Guidelines ("DOJ Guidelines"),²³ and other characteristics of the markets.

Small- and Medium-Sized Businesses, 76 *Federal Reserve Bulletin* 726 (1990).

20. See *Phillipsburg National*; *Philadelphia National*, 374 U.S. at 357. See also, *First Union Corporation*, 84 *Federal Reserve Bulletin* 489 (1998); *Chemical*; and *St. Joseph Valley Bank*, 68 *Federal Reserve Bulletin* 673 (1982) ("St. Joseph"). In delineating the relevant geographic market in which to assess the competitive effects of a bank merger or acquisition, the Board reviews population density; worker commuting patterns; the usage and availability of banking products; advertising patterns of financial institutions; the presence of shopping, employment, and other necessities; and other indicia of economic integration and transmission of competitive forces among banks. See *Crestar Bank*, 81 *Federal Reserve Bulletin* 200, 201, n.5 (1995); *Pennbancorp*, 69 *Federal Reserve Bulletin* 548 (1983); and *St. Joseph*.

21. These markets are described in Appendix B.

22. Deposit and market share data are based on SOD reports filed as of June 30, 2003, and on calculations in which the deposits of thrift institutions are included at 50 percent. The Board has indicated previously that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See, e.g., *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984). Thus, the Board regularly has included thrift deposits in the calculation of market share on a 50 percent weighted basis. See, e.g., *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991).

23. Under the DOJ Guidelines, 49 *Federal Register* 26,823 (1984), a market is considered unconcentrated if the post-merger HHI is under 1000 and moderately concentrated if the post-merger HHI is between 1000 and 1800. The DOJ has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI by more than 200 points. The DOJ has stated that the higher than normal HHI thresholds for screening bank mergers for anticompetitive effects implicitly recognize the competitive effects of limited-purpose lenders and other nondepository financial institutions.

16. Bank of America is adequately capitalized and adequately managed as defined in the Riegle–Neal Act. 12 U.S.C. § 1842(d)(1)(A). FleetBoston's subsidiary banks have been in existence and operated for the minimum age requirements established by applicable state law. See 12 U.S.C. § 1842(d)(1)(B). All other requirements under section 3(d) of the BHC Act also would be met on consummation of the proposal.

17. 12 U.S.C. § 1842(c)(1).

18. See *Chemical Banking Corporation*, 82 *Federal Reserve Bulletin* 239 (1996) ("Chemical") and the cases and studies cited therein. The Supreme Court has emphasized that it is the cluster of products and services that, as a matter of trade reality, makes banking a distinct line of commerce. See *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963) ("Philadelphia National"); accord *United States v. Connecticut National Bank*, 418 U.S. 656 (1974); *United States v. Phillipsburg National Bank*, 399 U.S. 350 (1969) ("Phillipsburg National").

19. Cole and Wolken, *Financial Services Used by Small Businesses: Evidence from the 1993 National Survey of Small Business Finance*, 81 *Federal Reserve Bulletin* 629 (1995); Elliehausen and Wolken, *Banking Markets and the Use of Financial Services by Households*, 78 *Federal Reserve Bulletin* 169 (1992); Elliehausen and Wolken, *Banking Markets and the Use of Financial Services by*

After consummation of the proposal, the Metropolitan New York–New Jersey banking market would remain unconcentrated, and the Fort Pierce, Sarasota, and West Palm Beach banking markets would remain moderately concentrated, as measured by the HHI.²⁴ Numerous competitors would remain in each banking market.

Consummation of the proposal would be consistent with Board precedent and the DOJ Guidelines in each of the banking markets. In addition, no agency has indicated that competitive issues are raised by the proposal. Based on these and all other facts of record, the Board concludes that consummation of the proposal is not likely to result in a significantly adverse effect on competition or on the concentration of banking resources in the four banking markets noted above or in any other relevant banking market. Accordingly, based on all the facts of record, the Board has determined that the competitive effects are consistent with approval of the proposal.

Financial, Managerial, and Other Supervisory Factors

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal and certain other supervisory factors. The Board has carefully considered the financial and managerial resources and future prospects of Bank of America, FleetBoston, and their respective subsidiary banks in light of all the facts of record. In reviewing the financial and managerial factors, the Board has considered, among other things, confidential reports of examination and other supervisory information received from the primary federal supervisors of the organizations involved and the Federal Reserve System's confidential supervisory information. In addition, the Board has consulted with the relevant supervisory agencies, including the Office of the Comptroller of the Currency ("OCC"), which is the primary supervisor of Bank of America's and FleetBoston's banks, and the SEC. The Board also has considered publicly available financial and other information on the organizations and their subsidiaries and all the information on the proposal's financial and managerial aspects submitted by Bank of America and FleetBoston during the application process.

The Board received several comments on the proposal criticizing the financial and managerial resources of Bank of America or FleetBoston and their respective subsidiaries.²⁵ Some commenters questioned whether the Board

and other federal agencies would have the ability to supervise the combined organization, or whether the combined organization would present special risks to the federal deposit insurance funds or the financial system in general. In addition, some commenters asserted that the Board should postpone consideration of the proposal in light of various investigations into certain investment banking, investment advisory, and corporate finance practices of Bank of America and its affiliates and should conduct its own inquiry into these matters.²⁶

In evaluating financial factors in expansion proposals by banking organizations, the Board consistently has considered capital adequacy to be an especially important factor.²⁷ Bank of America and FleetBoston and their subsidiary banks are well capitalized and would remain so on consummation of the proposal. The Board has considered that the proposed merger is structured as a share-for-share transaction and would not increase the debt service requirements of the combined company. The Board also has carefully reviewed other indicators of the financial strength and resources of the companies involved, including the earnings performance and asset quality of the institutions.

In addition, the Board has considered the managerial resources of the entities involved and of the proposed combined organization. Bank of America, FleetBoston, and their subsidiary depository institutions are considered well managed overall.²⁸ The Board has considered the

authorized to consider. The Board also notes that these concerns relate to instances that occurred more than 125 years ago and that have been the subject of substantial and repeated court proceedings. The Board believes that the matter primarily involves subjects of public concern that are not within the Board's limited jurisdiction to adjudicate or do not relate to the factors that the Board may consider when reviewing an application or notice under the BHC Act. *See Deutsche Bank AG*, 85 *Federal Reserve Bulletin* 509 (1999); *Union Bank of Switzerland*, 84 *Federal Reserve Bulletin* 684 (1998); *Norwest Corporation*, 82 *Federal Reserve Bulletin* 580 (1996). *See also, Western Bancshares, Inc. v. Board of Governors*, 480 F.2d 749 (10th Cir. 1973).

26. Some commenters cited press reports about investigations into the mutual fund industry generally, and Bank of America's mutual fund activities specifically, as well as structured financing transactions and other securities-related matters. As noted below, the Board has and will continue to consult with the SEC on these matters. The Board also received comments asserting that Bank of America, N.A., Charlotte, North Carolina ("BA Bank"), and other subsidiaries of Bank of America lack sufficient policies and procedures and other resources to prevent money laundering. The Board has reviewed confidential supervisory information on the policies, procedures, and practices of Bank of America to comply with the Bank Secrecy Act and has consulted with the OCC, the appropriate federal financial supervisory agency of BA Bank. Three commenters alleged that a predecessor institution of FleetBoston engaged in illegal tying in several loan transactions, and they criticized the behavior of FleetBoston's counsel in the ensuing litigation. The dispute involves several individual transactions that have been previously cited by the commenters. The Board and the OCC have the matter under review, and together they have sufficient supervisory authority to address any violation of law that may be determined.

27. *See, e.g., First Union Corporation*, 87 *Federal Reserve Bulletin* 663, 688 (2001).

28. Several commenters from Hawaii requested that the Board postpone action on the proposal until Bank of America fulfills two "commitments" it made to state and local governments and community groups in 1994. *See BankAmerica Corporation* 80 *Federal*

24. In the Metropolitan New York–New Jersey banking market, the HHI would increase 9 points to 983. The HHI would increase 35 points to 1,349 in the West Palm Beach banking market; remain unchanged at 1,259 in the Fort Pierce banking market; and increase 4 points to 1,252 in the Sarasota banking market. The effect of the proposal on the concentration of banking resources in each market is described in Appendix C.

25. More than 300 commenters expressed concern about accusations that a predecessor bank of FleetBoston financed slave trading allegedly conducted by one of its founders, after Congress outlawed the importation of slaves. The Board has carefully reviewed its authority under the federal banking laws and the extent that the matters raised by commenters relate to the factors that the Board is

supervisory experience and assessments of management by the various bank supervisory agencies and the organizations' records of compliance with applicable banking law. In addition, the Board has reviewed carefully the examination records of Bank of America and its subsidiary depository institutions, including assessments of their risk management systems and other policies. Senior management of the combined organization would draw from the senior executives of Bank of America and FleetBoston based on the individual management strengths of each company. In this case, senior executives of the two companies have formed a transition team to plan and manage the integration of the bank holding companies and their subsidiaries. Bank of America and FleetBoston have had experience with large mergers and have indicated that they are devoting significant resources to address all aspects of the merger process.

The Board is monitoring the various federal and state investigations of Bank of America's and FleetBoston's securities-related activities that are being conducted by agencies and other authorities with jurisdiction over these matters and is consulting with the SEC and other relevant authorities. Bank of America has cooperated with all regulatory authorities and has conducted an internal investigation into these matters. Importantly, Bank of America has demonstrated a willingness and ability to take actions to address concerns raised in these investigations, which include enhancing corporate governance capabilities, improving its monitoring of mutual fund operations, and providing more stringent disclosure requirements for structured-finance clients.

The Board has broad supervisory authority under the banking laws to require Bank of America to take steps necessary to address deficiencies identified in these investigations and examinations of Bank of America's and FleetBoston's securities-related and other activities after these reviews have been completed. This authority is in addition to authority vested in the SEC and other agencies to take appropriate action to determine and address violations of applicable securities and other laws.

The Board and other financial supervisory agencies have extensive experience supervising Bank of America, FleetBoston and their subsidiary depository institutions, as well

as other banking organizations that operate across multiple states or multiple regions. The Board has already instituted an enhanced supervisory program that permits the Board to monitor and supervise the combined organization effectively on a consolidated basis. This program involves, among other things, continuous holding company supervision, including both on- and off-site reviews, of the combined organization's material risks on a consolidated basis and across business lines; access to and analyses of the combined organization's internal reports for monitoring and controlling risks on a consolidated basis; and frequent contact with the combined organization's senior management. It also includes reviews of the policies and procedures in place at the holding company for assuring compliance with applicable banking, consumer, and other laws.²⁹ Consistent with the provisions of section 5 of the BHC Act as amended by the Gramm-Leach-Bliley Act, the Board relies on the SEC and other appropriate functional regulators to provide examination and other supervisory information regarding functionally regulated subsidiaries in order that the Board can fulfill its responsibilities as holding company supervisor of the combined entity.³⁰

Based on these and all the facts of record, including review of all the comments received,³¹ the Board concludes that considerations relating to the financial and managerial resources and future prospects of Bank of America, FleetBoston, and their respective subsidiaries are consistent with approval of the proposal. The Board also finds that the other supervisory factors that the Board must consider under section 3 of the BHC Act are consistent with approval.

Convenience and Needs Considerations

As previously discussed, section 3 of the BHC Act requires the Board to consider the effects of the proposal on the

Reserve Bulletin 623, 628 (1994) ("*Liberty Bank*"); and *NationsBank* at 876. A commenter also asserted that Bank of America's alleged failure to meet its Hawaii lending program "commitments" reflects adversely on its managerial resources and that the Board should take enforcement action. As also discussed below in considering the convenience and needs factor, Bank of America's public announcement of its Hawaii lending programs and goal for mortgage lending to Native Hawaiians on Hawaiian Home Lands was not a commitment to the Board and it is not enforceable by the Board. Bank of America has made progress toward meeting its announced lending goal and has represented that its assumptions for achieving the goal within the original time frame proved to be unrealistic because of unexpected complexities in the lending process and competition with other lenders. Bank of America recently affirmed its intent to complete the goal for mortgage lending on Hawaiian Home Lands and has announced steps to enhance its ability to meet that goal, including actions that have been coordinated with the State of Hawaii Department of Hawaiian Home Lands.

29. Some commenters have questioned whether the securitization activities of Bank of America promote the origination of predatory loans. As described more fully below in footnote 35, the Board has considered the policies and programs in place at Bank of America to help ensure that the subprime loans it purchases and securitizes are in compliance with applicable state and federal consumer protection laws.

30. For additional information concerning the Board's supervisory program for large, complex banking organizations, such as Bank of America, see *Supervision of Large Complex Banking Organizations*, 87 *Federal Reserve Bulletin* 47 (2001).

31. Commenters also expressed concern about the following matters:

- (1) the number of minorities serving in Bank of America's senior management,
- (2) whether Bank of America's supplier diversity program is effectively serving minority- and women-owned businesses,
- (3) Bank of America's financing of various activities and projects worldwide that might damage the environment or cause other social harm,
- (4) Bank of America's alleged opposition to legislation addressing "predatory" lending, and
- (5) interchange fees charged by Visa and Mastercard. These contentions and concerns are outside the limited statutory factors that the Board is authorized to consider when reviewing an application under the BHC Act. See *Western Bancshares*.

convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the CRA. The CRA requires the federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of local communities in which they operate, consistent with their safe and sound operation, and it requires the appropriate federal financial supervisory agency to take into account an institution's record of meeting the credit needs of its entire community, including LMI neighborhoods, in evaluating bank expansionary proposals. The Board has carefully considered the convenience and needs factor and the CRA performance records of the subsidiary depository institutions of Bank of America and FleetBoston, including public comments on the effect the proposal would have on the communities to be served by the resulting organization.

A. Summary of Public Comments on Convenience and Needs

In response to the Board's request for public comment on this proposal, approximately 300 commenters submitted comments or testified at the public meetings in support of the proposal. These commenters generally commended Bank of America or FleetBoston for the financial and technical support provided to their community development organizations or related their favorable experiences with specific programs or services offered by Bank of America. Many of these commenters also expressed their support for Bank of America's Community Development Initiative.

Approximately 190 commenters submitted comments that expressed concern about the lending records of Bank of America or FleetBoston, recommended approval only if subject to conditions suggested by the commenter, or expressed concern about large bank mergers in general.³² Other commenters alleged that lending, customer service, and philanthropy have declined at Bank of America and FleetBoston after their previous mergers. Some commenters neither supported nor opposed the proposal, but provided information about Bank of America's and FleetBoston's performance in their communities.

Many of the commenters who opposed or expressed concern about the proposal alleged that Bank of America's level of home mortgage lending to LMI or minority borrowers or in LMI or predominantly minority communities was low in various parts of the country, including California and North Carolina. In addition, several commenters criticized FleetBoston's home mortgage lending record. Some commenters alleged that Bank of America's small

business lending in California or other markets was inadequate, particularly to businesses in LMI or predominantly minority communities.³³ Several commenters criticized Bank of America's general efforts toward small business lending, especially its level of lending to microenterprises.³⁴ Several commenters criticized Bank of America's due diligence with respect to its purchase and securitization of subprime loans.³⁵ Other commenters expressed concern that Bank of America's corporate decisions would not take into account the diversity and community reinvestment needs of New England, California, or North Carolina. Some commenters expressed doubts that Bank of America would assign local representatives to its community reinvestment and development programs.³⁶

In addition, some commenters expressed concern that consummation of the proposal would result in branch closures in LMI or predominantly minority communities, or they criticized the percentage of Bank of America and FleetBoston branches in LMI areas. Many commenters asserted that Bank of America should augment the array or adjust the pricing of banking services that it provides, particularly to LMI individuals.³⁷ Some commenters sug-

33. Some commenters also criticized FleetBoston's level of small business lending for being too low.

34. These commenters defined a microenterprise as a business with five or fewer employees and less than \$35,000 in capital.

35. Several commenters maintained that Bank of America purchases subprime loans and securitizes them without performing adequate due diligence to screen for "predatory" loans, and some commenters urged Bank of America to adopt particular factors or methods for such screening. Several commenters also criticized Bank of America for its recent investment in a subprime lending company, Oakmont Mortgage Company, Woodland Hills, California ("Oakmont"), after Bank of America had publicly announced that it would not originate subprime mortgage loans. None of these commenters, however, provided evidence that Bank of America had originated, purchased, or securitized "predatory" loans or otherwise engaged in abusive lending practices. Bank of America provides warehouse lines of credit to, and purchases subprime mortgage loans from, subprime lenders through BA Bank, and securitizes pools of subprime mortgage loans. Bank of America has policies and procedures, including sampling loans in the pool, to help ensure that the subprime loans it purchases and securitizes are in compliance with applicable state and Federal consumer protection laws. It also conducts a due diligence review of firms from which it purchases subprime loans, and the loan servicer firms selected for each securitization, to help prevent the purchase and securitization of loans that are not in compliance with applicable state and Federal consumer protection laws. As the Board previously has noted, subprime lending is a permissible activity and provides needed credit to consumers who have difficulty meeting conventional underwriting criteria. The Board continues to expect all bank holding companies and their affiliates to conduct their subprime-lending-related operations free of any abusive lending practices and in compliance with all applicable law, including fair lending laws. See *Royal Bank of Canada*, 88 *Federal Reserve Bulletin* 385, 388 n.18 (2002). The Board notes that the OCC has responsibility for enforcing compliance with fair lending laws by national banks and that the Federal Trade Commission, Department of Housing and Urban Development ("HUD"), and DOJ have responsibility for enforcing such compliance by nondepository institutions.

36. Other commenters expressed concern that Bank of America's board of directors and senior management would not include local representation.

37. One commenter contended that Bank of America and FleetBoston have failed to serve the needs of LMI communities

32. Several commenters contended that a greater risk exists that larger banking organizations may improperly share customer information among affiliates. One commenter questioned FleetBoston's procedures for safeguarding accounts from unauthorized access, based on her experiences with the bank. This comment has been forwarded to the OCC, which is the primary federal regulator for Fleet Bank. Bank of America has policies and procedures in place to address the sharing and safeguarding of customer information.

gested that Bank of America should provide more culturally sensitive retail banking services and hire more minorities, including Native Americans.

Several commenters contended that data submitted under the Home Mortgage Disclosure Act (12 U.S.C. § 2801 *et seq.*) (“HMDA”) suggested that Bank of America and FleetBoston engaged in disparate treatment of minority individuals in home mortgage lending. Many commenters in several states criticized the terms of Bank of America’s recent Community Development Initiative. Other commenters criticized Bank of America’s performance under its previous community reinvestment pledges or its refusal to enter into or renew written agreements with their respective community groups. In addition, some commenters expressed concern about the loss of FleetBoston as an independent organization, which they contended had a better overall CRA performance record than Bank of America.

B. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the appropriate federal supervisors’ examinations of the CRA performance records of the relevant insured depository institutions. An institution’s most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution’s overall record of performance under the CRA by its appropriate federal supervisor.³⁸

Bank of America’s lead bank, BA Bank, received an “outstanding” rating at its most recent CRA performance evaluation by the OCC, as of December 31, 2001. Fleet Bank also received an “outstanding” rating at its most recent CRA performance evaluation by the OCC, as of July 23, 2001. All other subsidiary banks of Bank of America and FleetBoston received either “outstanding” or “satisfactory” ratings at their most recent CRA performance evaluations by the OCC.³⁹

Bank of America stated that it would identify the best products and services currently offered by either Bank of America or FleetBoston and aim to make them available to all customers and that it has no current plans to discontinue any products or services of FleetBoston.

adequately under the CRA because they have discontinued the deposit accounts of check-cashing businesses. The Board previously addressed this allegation in its order approving the merger of FleetBoston and Summit Bancorp. *FleetBoston Financial Corporation*, 87 *Federal Reserve Bulletin* 252 (2001). Other commenters criticized Bank of America for extending loans to payday lenders.

38. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001).

39. Bank of America, National Association (USA), Phoenix, Arizona, received a “satisfactory” rating, as of December 31, 2001; Fleet Bank (RI) received an “outstanding” rating, as of February 3, 2003. Fleet Maine is a limited-purpose bank that is not subject to the CRA.

C. CRA Performance of BA Bank

Overview

As noted above, BA Bank received an overall “outstanding” rating for performance under the CRA.⁴⁰ The bank also received an “outstanding” rating under the lending test. Examiners commended BA Bank’s overall lending performance, which they described as demonstrating excellent or good lending test results in all its rating areas. During the evaluation period, BA Bank originated more than 828,200 HMDA-reportable home mortgage loans, totaling more than \$112 billion throughout its assessment areas.⁴¹ Examiners reported that rating areas in which the distribution of HMDA-reportable mortgage loans among areas of different income levels was good.

In addition, examiners commended BA Bank for developing mortgage loan programs with flexible underwriting standards, such as its Neighborhood Advantage programs, and they reported that these programs assisted in meeting the credit needs of its assessment areas. The Neighborhood Advantage programs include the Neighborhood Advantage Zero Down loan product, which is tailored for LMI applicants who have good credit histories but are unable to make a down payment. The Neighborhood Advantage Credit Flex program is another affordable mortgage product tailored for LMI borrowers, or borrowers who live in low-income census tracts, who pay their bills on time but who do not have established credit histories. Although this product requires a 3 percent down payment, examiners reported that the borrower is required to contribute only one-third of the down payment and the remainder may be provided from “gifts or other sources.”

During the evaluation period, BA Bank originated more than 142,480 small business and small farm loans, totaling \$12.4 billion, in its assessment areas.⁴² Examiners reported

40. At the time of the 2001 performance evaluation, BA Bank had 218 assessment areas, 34 of which received a full-scope review. The overall rating for BA Bank is a composite of its state/multistate ratings. In the 2001 performance evaluation, examiners provided detailed narratives with respect to BA Bank’s performance in certain assessment areas examiners selected as “primary rating areas.” These areas represented 69 percent of the bank’s deposits during the review period. Examiners determined that BA Bank’s primary rating areas were California, the Charlotte–Gastonia–Rock Hill (NC–SC) Multi-state Metropolitan Statistical Area (“Charlotte MSA”), Florida, and Texas. The evaluation period was January 1, 2001, through December 31, 2001.

41. In BA Bank’s 2001 performance evaluation, home mortgage lending data included loans originated and purchased.

42. Commenters contended that BA Bank has a poor record of lending to small businesses, especially small businesses owned by women and minorities or operating in LMI areas. Commenters urged Bank of America to increase its small business lending in these communities. Bank of America represented that, in 2002 and 2003, it was ranked as the number-one Small Business Administration (“SBA”) lender in terms of the number of loans originated nationwide. Bank of America represented that BA Bank also is a SBA “Preferred Lender” in every state where it has retail branches, which helps to ensure an accelerated application process for small business customers. According to the SBA, Bank of America’s average loan size is approximately \$37,000, which is smaller than the average SBA

that the bank's small business lending was excellent or good in the majority of its rating areas. They also noted that the distribution of small business loans among businesses of different sizes was good in several of BA Bank's assessment areas.⁴³

Examiners noted that in many instances BA Bank originated community development loans in greater amounts than expected to achieve excellent performance.⁴⁴ BA Bank originated more than 970 community development loans, totaling \$2.3 billion, in its assessment areas during the evaluation period.⁴⁵ Examiners reported that letters of credit originated by the bank contributed significantly to BA Bank's community development goals because these activities supported the creation of an additional 13,622 affordable homes.

BA Bank received an "outstanding" rating overall under the investment test.⁴⁶ During the review period, the bank made more than 3,500 investments totaling \$1.3 billion in the states in which it has a banking presence. Examiners reported that BA Bank consistently demonstrated strong investment test performance, noting that its performance was excellent or good in the majority of its assessment areas.⁴⁷ Throughout its assessment areas, BA Bank funded

more than 17,000 housing units for LMI families through its community development investments.⁴⁸ Examiners commended BA Bank for taking a leadership role in developing and participating in complex investments that involved multiple participants and both public and private funding. In addition, examiners noted that BA Bank frequently extended grants to assist organizations that are incapable of supporting additional debt or providing a sufficient investment return.

Overall, BA Bank received a "high satisfactory" rating under the service test.⁴⁹ Examiners commended BA Bank's service performance throughout its assessment areas.⁵⁰ They reported that the bank's retail delivery systems were generally good and that the bank's distribution of branches among geographies of different income levels was adequate.⁵¹ Examiners also commended BA Bank for its community development services, which typically responded to the needs of the communities the bank served throughout its assessment areas.

loan, and it provides needed loans to businesses that have a more difficult time obtaining credit.

43. Florida was among BA Bank's assessment areas cited by examiners as demonstrating excellent performance in the distribution of small business and small farm loans among businesses and farms of different revenue sizes.

44. Some commenters expressed concern about Bank of America's performance under its community development program for rural communities and Native Americans. Bank of America established the Rural 2000 Initiative in 1997 to increase its lending in rural LMI areas and communities with large Native-American populations. *See NationsBank*. Bank of America represented that for the period 1999 through November 2003, it provided \$28 billion for affordable housing, \$9.1 billion for small business/small farm lending, \$3.4 billion for consumer lending, and \$466 million in economic development loans in these areas. Bank of America represented that between 2000 and 2003, it originated \$120.8 million in loans to Indian Country (census tracts with a Native-American population of 50 percent or more) and it provided loans to improve the infrastructure on Native American lands.

45. In June 2003, Bank of America began a new nationwide loan program to support the construction of 15,000 new affordable housing units in the next three years.

46. Several commenters maintained that Bank of America should be required to donate a specified percentage of its pre-tax income to charities. Bank of America represented that it has a record of providing significant corporate philanthropic donations in all the communities that it serves. One commenter also asserted that Bank of America allocates a disproportionate share of its charitable giving to health, education, and the arts and that its contributions to community development are insufficient. The Board notes that neither the CRA nor the agencies' implementing rules require that institutions engage in charitable giving.

47. One commenter asserted that Bank of America financially rewards community groups that comment or testify in support of Bank of America merger proposals and refuses to invest in or lend to organizations that oppose its merger proposals. The CRA does not authorize the Board to direct Bank of America's community development investment or lending activities to specific groups, individuals, or projects.

48. Bank of America also has provided grants to nonprofit organizations, such as ACCION and the New Mexico Community Development Loan Fund, that originate microlans starting at \$500 and promote SBA programs.

49. Several commenters in California and other locations criticized BA Bank for not providing low-cost money orders, and they criticized its basic checking account as ill-suited for LMI customers. BA Bank offers the "My Access" account, which features a low opening deposit of \$25 and free checking with direct deposit. Other commenters urged Bank of America to offer specific services, such as Interest on Lawyer Trust Accounts at certain rates. Bank of America stated that no decisions have been made at this time about the products and services to be offered after the merger. As previously noted, Bank of America has represented that it would identify the best products and services offered by either organization and proposes to make them available to customers throughout the franchise. Although the Board has recognized that banks can help to serve the banking needs of communities by making certain products or services available on certain terms or at certain rates, the CRA neither requires an institution to provide any specific types of products or services nor prescribes the costs charged for them.

50. Some commenters criticized Bank of America for charging recipients of public assistance fees to access their electronic benefits at Bank of America ATMs. Bank of America represented that it offers Electronic Transfer Accounts ("ETAs") through a program with the Department of the Treasury and that it does not impose fees on its ETA customers for accessing their benefits through that program at Bank of America ATMs. In addition, Bank of America stated that it offers electronic benefit transfer accounts ("EBTAs") through programs with state and local governments. Under current Bank of America policy, EBTAs customers are assessed a standard ATM surcharge to access their cash benefits at Bank of America ATMs except in Illinois. Bank of America is in the process of evaluating its current practices as part of its review of products and services offered by both organizations in light of the fact that FleetBoston does not impose ATM access fees for participation in EBTAs. Although the Board has recognized that banks help to serve the banking needs of their communities by making basic banking services available at a nominal or no charge, the CRA does not require that banks limit the fees charged for services.

51. Several commenters alleged that mergers have had a negative impact on the retail banking services provided by Bank of America and FleetBoston to minorities and LMI individuals in several states, including California, New Jersey, New York, North Carolina, Rhode Island, and Georgia.

California

1. *Lending Test.* In California, BA Bank received an “outstanding” rating under the lending test.⁵² Examiners described the bank’s lending in the full-scope California assessment areas as reflecting excellent responsiveness to the credit needs of these communities. During the evaluation period, BA Bank originated more than 264,100 HMDA-reportable home mortgage loans totaling almost \$46 billion in the California assessment areas.

Examiners commended BA Bank for its distribution of home mortgage loans among geographies of different income levels and for offering bankwide flexible lending programs and innovative lending products during the evaluation period. Examiners reported that, in the Los Angeles–Long Beach and San Francisco MSAs, the proportion of BA Bank’s home purchase and refinance loans originated to borrowers in LMI census tracts approximated or exceeded the percentage of owner-occupied units in those areas, and the bank’s market share of such loans in LMI census tracts approximated or exceeded the bank’s overall market share of those types of loans in the MSAs. In addition, examiners noted that its market share of home purchase and refinance loans originated to LMI borrowers generally exceeded the bank’s overall market share of those types of loans in the Los Angeles–Long Beach MSA. In the San Francisco MSA, the bank’s market share of home purchase loans originated to LMI borrowers was less than the bank’s overall market share of such loans within the MSA, but its market share of refinance loans originated to LMI borrowers approximated or exceeded its overall market share of such loans in the MSA.

Since the 2001 performance evaluation, BA Bank has maintained a substantial level of home mortgage lending. It originated more than 220,890 HMDA-reportable home mortgage loans in California, totaling almost \$60 billion, in 2002.⁵³

During the evaluation period, BA Bank originated more than 51,300 small loans to businesses,⁵⁴ totaling \$3.5 billion, in its California assessment areas. In the Los Angeles–Long Beach MSA, the percentage of BA Bank loans to small businesses exceeded the percentage of those businesses in the MSA. Examiners reported that the bank’s geographic distribution of small loans to businesses in the Los Angeles–Long Beach and San Francisco MSAs was excellent. They noted that the number of BA Bank’s small loans to businesses in LMI areas represented 32 percent of its total number of such loans in the Los Angeles–Long Beach MSA and more than 34 percent

of its total number of such loans in the San Francisco MSA. The majority of the bank’s small loans to businesses in the Los Angeles–Long Beach and San Francisco MSAs were originated to small businesses.

Since the 2001 performance evaluation, BA Bank has continued to originate a significant number of small loans to businesses. In 2002, it originated more than 9,300 small loans to businesses in California, totaling more than \$1 billion. Bank of America noted that, in 2002 and 2003, more than 30 percent of its total number of government-guaranteed small loans to businesses were made in California.

Examiners reported that BA Bank’s community development lending had a positive impact on its lending performance in the state. The bank originated more than 250 community development loans, totaling more than \$685 million, in its California assessment areas during the evaluation period. Examiners also noted that BA Bank originated 67 community development loans, totaling almost \$135 million, in the Los Angeles–Long Beach MSA.⁵⁵ These loans supported affordable housing projects that created more than 1,000 LMI housing units. In the San Francisco MSA, BA Bank originated 15 community development loans, totaling \$42.8 million, which provided 300 housing units for LMI households.

BA Bank has continued to originate a substantial amount of community development loans in California since the 2001 performance evaluation. Bank of America represented that BA Bank originated 150 community development loans in California, totaling \$588 million, as of the third quarter of 2003. These community development loans included a \$10.2 million loan in 2002 that funded the construction of an affordable housing development in the San Jose, California, MSA, and a \$29 million loan in 2003 that funded the demolition of 86 units of public housing and the construction of 180 new units of affordable apartments for LMI families in the Oakland MSA.⁵⁶

2. *Investment Test.* BA Bank received an “outstanding” rating under the investment test in the California assessment areas. In the Los Angeles–Long Beach and San Francisco MSAs, BA Bank made more than 300 community development investments, totaling approximately \$219 million, during the review period, the majority of which supported the development of affordable housing. The bank also invested \$31.6 million in Qualified Zone Academy Bonds (“QZABs”), which are issued in conjunction with a federal program designed to help strengthen schools serving large concentrations of low-income families.

52. Approximately 34 percent of BA Bank’s total bank deposits were in California during the evaluation period. In evaluating BA Bank’s California assessment areas, examiners conducted full-scope reviews in the Los Angeles–Long Beach and the San Francisco MSAs. The bank’s other California assessment areas received limited-scope reviews.

53. BA Bank’s 2002 HMDA-reportable loan data are for originations and purchases in the MSA portions of its assessment areas only.

54. In this context, “small loans to businesses” are loans with original amounts totaling \$1 million or less, and “small businesses” are businesses with annual revenues of \$1 million or less.

55. Some commenters urged Bank of America to provide additional financing for the construction of multifamily homes in LMI areas, particularly in California and Connecticut. These commenters also encouraged Bank of America to participate with more nonprofit affordable housing developers.

56. Bank of America represented that its affordable housing lending and investing also has increased from \$9 billion in 1999 to \$26.4 billion in 2003.

Since the 2001 performance evaluation, BA Bank has continued its strong community development investment activity in California. Bank of America represented that BA Bank made more than 160 qualified investments in California totaling, \$125 million in 2002, and more than 110 qualified investments totaling \$170 million, as of the third quarter of 2003. These investments in 2002 and 2003 included a \$2.9 million investment in an affordable housing project in the Bakersfield, California, MSA and a \$17 million investment to complete an affordable housing project providing 179 units for LMI families in the Oakland MSA.

3. *Service Test.* BA Bank received a “high satisfactory” rating under the service test in its California assessment areas. BA Bank operated 950 branches and more than 3,600 ATMs in California during the evaluation period. Examiners found that alternative delivery systems, such as electronic banking and telephone, improved access to retail banking services particularly by LMI individuals. In addition, examiners found that BA Bank’s distribution of branches in LMI census tracts in the Los Angeles–Long Beach and San Francisco MSAs was reasonable in light of the percentage of the population residing in those geographies. Examiners also commended BA Bank for its community development services in the Los Angeles–Long Beach MSA during the review period, noting that the institution provided technical assistance to 57 organizations that pursued a variety of initiatives designed to assist LMI individuals and communities.

North Carolina and Charlotte MSA

Bank of America and BA Bank are headquartered in the Charlotte MSA. In evaluating BA Bank’s CRA performance in North Carolina, the OCC reviewed and rated the Charlotte MSA separately from the bank’s performance in the rest of the state because it is a multistate MSA.⁵⁷ Under the lending test, BA Bank received an “outstanding” rating in the Charlotte MSA and a “high satisfactory” rating in North Carolina.

1. *Lending Test.* BA Bank originated more than 42,500 HMDA-reportable home mortgage loans in its North Carolina assessment areas and the Charlotte MSA assessment area (collectively, “combined North Carolina assessment areas”), totaling more than \$5 billion, during the review period.

Examiners reported that BA Bank’s lending levels reflected good responsiveness to the credit needs in the Charlotte MSA and excellent responsiveness in the other North Carolina assessment areas. They found that the

distribution of BA Bank’s loans among geographies was good throughout its assessment areas. In particular, examiners noted that the proportion of BA Bank’s home purchase and refinance loans made to borrowers in low-income geographies approximated or exceeded the percentage of owner-occupied units in those areas in the Charlotte MSA, and that the bank’s market share of such loans in low-income geographies generally exceeded the bank’s overall market share of such loans in the MSA. In addition, examiners found that the distribution of BA Bank’s loans among borrowers of different income levels was good in the Charlotte MSA and that such distribution was adequate in the other North Carolina assessment areas. Examiners noted, however, that the bank’s lending performance was excellent in the Greensboro MSA, including good geographic and borrower distribution of home mortgage loans. Examiners also particularly commended BA Bank’s performance in the Asheville MSA as excellent and noted that it exceeded the bank’s overall performance in North Carolina because of a more favorable distribution of loans among geographies of different income levels.

Since the 2001 performance evaluation, BA Bank has maintained a significant level of home mortgage lending in North Carolina, originating more than 20,000 HMDA-reportable loans that totaled more than \$3 billion in its North Carolina assessment areas in 2002.⁵⁸ BA Bank originated more than 9,000 HMDA-reportable loans during 2002 in the Charlotte MSA, totaling \$1.4 billion.

During the evaluation period, BA Bank originated more than 4,840 small loans to businesses, totaling more than \$609 million, in its combined North Carolina assessment areas. Almost 1,500 of these loans, totaling \$196.3 million, were originated to businesses in the Charlotte MSA. Examiners noted that the borrower distribution of BA Bank’s small loans to businesses in the Charlotte MSA and Greensboro MSA was good during the evaluation period. They reported that the number of small loans to businesses in LMI areas in the Charlotte MSA represented more than 32 percent of the small loans to businesses originated in the MSA.

Since the 2001 performance evaluation, BA Bank has continued to provide substantial amounts of small loans to businesses in North Carolina. In 2002, BA Bank originated 1,334 small loans to businesses, totaling more than \$288 million, in North Carolina.⁵⁹ In addition, Bank of America represented that BA Bank extended the largest number of SBA loans in North Carolina for the fifth consecutive year in 2003.

Examiners reported that BA Bank’s community development lending had a significant positive impact on the bank’s overall performance throughout the state. BA Bank originated 25 community development loans, totaling more

57. As previously noted, the examiners conducted a full-scope review of the Charlotte MSA, which includes a portion of South Carolina. In the rest of North Carolina, examiners conducted a fullscope review of the Greensboro–Winston-Salem–High Point MSA (“Greensboro MSA”) and limitedscope reviews in the Asheville, Fayetteville, Goldsboro, Greenville, Hickory–Morganton–Lenoir, Jacksonville, Raleigh–Durham–Chapel Hill, and Wilmington MSAs.

58. These 2002 statewide data represent HMDA-reportable loans originated and purchased by BA Bank in the MSA portions of its assessment areas in North Carolina.

59. BA Bank’s small business lending data for 2002 represent small business loans originated by BA Bank in its North Carolina assessment areas, including the North Carolina portions of the Charlotte MSA.

than \$238 million, in its combined North Carolina assessment areas during the review period.⁶⁰ They noted that the majority of the bank's community development lending in the Charlotte MSA supported affordable housing projects. In addition, examiners reported that more than 1,000 housing units for LMI families were created as a result of BA Bank's community development lending activities in the Charlotte MSA during the evaluation period.

Since the 2001 performance evaluation, BA Bank has continued to engage in a substantial level of community development lending in North Carolina. Bank of America represented that BA Bank originated 46 community development loans, totaling more than \$480 million, from 2001 through the third quarter of 2003 in the combined North Carolina assessment areas. These community development loans in 2002 and 2003 included a \$4.3 million loan in the Greensboro MSA that provided 145 units of affordable housing, a \$2 million loan that provided 50 units of housing for LMI families in Havelock, North Carolina, and a \$37 million loan to finance a 336-unit affordable housing project in the Charlotte MSA that replaced 229 public housing units. In addition to providing 112 additional housing units for LMI families, this new housing development in the Charlotte MSA would include space for after-school childcare and computer classes.

2. Investment Test. BA Bank received an "outstanding" rating in its North Carolina assessment areas, but a "low satisfactory" rating in the Charlotte MSA, under the investment test. Examiners noted that the bank's volume of community development investments reflected an excellent level of responsiveness to the needs of its North Carolina assessment areas. BA Bank made more than 100 qualified investments in its combined North Carolina assessment areas, totaling more than \$40 million, during the evaluation period that provided more than 500 housing units to LMI families. These community development investments included two Low-Income Housing Tax Credits ("LIHTCs"), totaling \$4.4 million, that provided more than 85 units of housing for LMI families in the Greensboro MSA and more than \$18 million in investments that included projects creating more than 425 housing units for LMI households in the Charlotte MSA.⁶¹ Examiners reported that BA Bank's other community development investments included contributions to local or regional organizations that provide community development, hous-

ing, and financial services to LMI areas and individuals or funding for small business development.

BA Bank has continued its considerable level of community development investments in North Carolina since the 2001 performance evaluation. Bank of America represented that BA Bank originated 62 community development investments totaling \$63 million, as of the third quarter of 2003. BA Bank's community development investments made in 2002 and 2003 included an LIHTC to complete an affordable housing project in an LMI neighborhood in the Raleigh MSA.

3. Service Test. Under the service test, BA Bank received an "outstanding" rating in the Charlotte MSA and a "high satisfactory" rating in North Carolina. Examiners reported that BA Bank operated 208 branches and 292 ATMs in the combined North Carolina assessment areas during the review period. In the Charlotte MSA, approximately 7 percent of the bank's branches were in low-income census tracts, which exceeded the percentage of the population living in such areas. In addition, more than 15 percent of the bank's branches were in moderate-income census tracts in the Charlotte MSA, which almost equaled the percentage of the population living in those areas. Examiners also reported that BA Bank's branch accessibility to LMI geographies was excellent in the Greensboro MSA.

Examiners also commended BA Bank for its community development services in the Charlotte MSA. These services included technical assistance to organizations providing community development, housing, and financial services to LMI individuals during the evaluation period.

D. CRA Performance of Fleet Bank

1. Lending Test. As previously noted, Fleet Bank received an overall "outstanding" rating for CRA performance from the OCC, as of July 23, 2001.⁶² Fleet Bank also received an "outstanding" rating overall and under the lending test in the Boston MA-NH Multistate MSA ("Boston MSA"), which represented the largest share of the bank's deposits during the evaluation period.⁶³ During this period, Fleet Bank originated more than 216,900 HMDA-reportable

60. Two commenters asserted that Bank of America has only one community development officer serving North Carolina and South Carolina. Bank of America represented that seven associates from its Community Development Banking Group serve the needs of North Carolina and South Carolina.

61. One commenter criticized Bank of America's support of two Hope IV housing projects in Charlotte. One project provided a mix of public housing, low-income, and market-rate tenants and homeowners. Bank of America represented that its decisions regarding this project were made in concert with the Charlotte Housing Authority under HUD guidelines and that its involvement in the other project was very limited. As noted above, examiners reported that BA Bank engaged in numerous community development projects.

62. The evaluation period was January 1, 1998, through December 31, 2000; community development loans and qualified investments were considered from January 1, 1998, through June 30, 2001. In the 2001 performance evaluation, Fleet Bank's home mortgage lending data included loans originated and purchased. Fleet Bank requested that the OCC consider the loans, investment, and services originated or purchased by Fleet Mortgage Company, Fleet Development Ventures, BankBoston Development Company, Fleet CDC, Fleet Securities, and BankBoston Capital as part of the bank's CRA-related performance. Examiners noted that Fleet Bank merged with other institutions, including BankBoston, during the evaluation period. They also noted that, in connection with the merger with BankBoston in 1999, FleetBoston was required to divest 306 branches.

63. Fleet Bank also received "outstanding" overall ratings in New York; the multistate MSAs of Lawrence MA-NH; New London-Norwich CT-RI; and Providence-Fall River RI-MA ("Providence MSA"). Fleet Bank received "satisfactory" overall ratings in Connecticut, Florida, Maine, Massachusetts, New Hampshire, New Jersey, and the Portsmouth-Rochester NH-ME Multistate MSA.

loans in its assessment areas, totaling more than \$22 billion. These loans included more than 28,500 HMDA-reportable loans, totaling \$3.5 billion, in the Boston MSA and more than 10,690 home mortgage loans in the Providence MSA, totaling more than \$950 million.⁶⁴ In addition, examiners reported that Fleet Bank originated 23,750 home mortgage loans, totaling \$2.5 billion, in Connecticut and more than 66,840 home mortgage loans in New York, totaling \$6.5 billion. They commended Fleet Bank for the excellent overall geographic and borrower distribution of its home mortgage lending throughout its assessment areas. In addition, examiners found that Fleet Bank's home purchase loans originated to LMI borrowers in LMI census tracts generally exceeded the bank's overall market share of such loans. They also noted that the opportunities for lending in LMI areas in several areas were limited because of the low percentage of owner-occupied units in those census tracts.⁶⁵

Examiners commended Fleet Bank for developing flexible lending products and programs such as LMI Equity Loans, which are home equity products tailored for LMI borrowers or borrowers living in LMI areas, and Fleet Affordable Advantage, a program which offers home mortgages that feature a low down payment, no mortgage insurance, and no origination fee. In addition, they reported that Fleet Bank participated in several government-sponsored programs that offered flexible underwriting for home mortgages through secondary market providers. In partnership with four state mortgage financing agencies (Rhode Island, New Hampshire, New York, and New Jersey), Fleet Bank also originated loans through the Jumpstart program to cover down payment and closing costs at the time the agencies originated the first mortgage loans. Fleet Bank also offered flexible home mortgage loan products through the Massachusetts Soft Second Program, which features a below-market interest rate, no points, and no mortgage insurance.⁶⁶

During the evaluation period, Fleet Bank originated more than 49,290 small loans to businesses, totaling more than \$4 billion. Examiners reported that these loans included more than 10,700 small loans to businesses in the Boston MSA, totaling \$811 million, and more than 4,000 small loans to businesses in the Providence MSA, totaling almost \$400 million.⁶⁷ They also reported that Fleet Bank originated more than 6,900 small loans to businesses in

Connecticut, totaling more than \$560 million, and more than 12,640 small loans to businesses in New York, totaling more than \$1.2 billion. Examiners noted, however, that the bank's market share of loans to small businesses was less than its overall market share of small loans to businesses in the Boston MSA. Examiners commended the bank for its excellent geographic distribution of loans to small businesses in the Hartford MSA. They reported that Fleet Bank also participated in government-sponsored programs offering flexible underwriting for small businesses through the SBA.

Examiners particularly commended Fleet Bank for its high level of community development lending throughout its assessment areas. They described Fleet Bank's community development lending as focused on assisting the development of affordable housing and promoting economic development to revitalize LMI areas in its assessment areas. During the review period, Fleet Bank originated more than 460 community development loans, totaling more than \$1 billion, in its assessment areas. Examiners reported that Fleet Bank originated 76 community development loans in the Boston MSA, totaling \$602 million, and 30 loans in the Providence MSA, totaling almost \$36 million. They also reported that Fleet Bank originated almost 60 community development loans in Connecticut, totaling more than \$147 million, and more than 190 loans in the State of New York, totaling more than \$680 million.

These community development loans included a \$3.1 million commercial real estate loan to finance the renovation of a building in an empowerment zone and multiple lines of credit ranging from \$15 million to \$44 million, which facilitated LIHTC activities by providing interim funding, in the Boston MSA. In the Providence MSA, the bank made a \$3.1 million loan to fund the rehabilitation of an inactive factory building as part of a neighborhood revitalization plan in a low-income area. Examiners also reported that Fleet Bank originated a \$14 million community development loan to finance the comprehensive revitalization of a low-income area in the Hartford MSA and a \$25 million loan to finance the rehabilitation of a major apartment, condominium, and commercial complex in the Parkchester section of the Bronx.

2. Investment Test. Fleet Bank received an "outstanding" rating under the investment test. During the evaluation period, Fleet Bank made more than 2,400 community development investments in its assessment areas, totaling more than \$870 million. Examiners reported that Fleet Bank made more than 350 qualified investments, totaling \$22.4 million, in the Boston MSA and 115 investments in the Providence MSA, totaling more than \$28 million. They also reported that the bank made more than 350 community development investments in Connecticut, totaling more than \$42 million, and 887 investments in New York, totaling more than \$120 million. These community development investments included a \$2 million investment to fund an affordable housing organization's development activities in the Boston MSA; an LIHTC in Bristol,

64. Some commenters asserted that FleetBoston has neglected the lending and community reinvestment needs of Rhode Island because of its recent acquisitions and mergers.

65. These areas included the Boston, Albany-Schenectady, and Nassau-Suffolk MSAs. Examiners also noted that in the New York City MSA, housing affordability is a significant issue and housing is not generally affordable without a subsidy, even for middle-income borrowers.

66. Several commenters urged Bank of America to participate in the Massachusetts Soft Second program after it acquires FleetBoston. Other commenters suggested that Bank of America should continue FleetBoston's membership in the Federal Home Loan Bank of Boston and establish a Massachusetts community advisory board.

67. Examiners noted that, based on its volume of lending, Fleet Bank was recognized as the number-one SBA lender in 2000.

Rhode Island, totaling almost \$6 million; and five LIHTCs, totaling \$11 million, in the Hartford MSA. Examiners reported that the bank's community development investments have had a positive impact on the Boston MSA and they commended the bank's investment activities as demonstrating complexity, leadership, flexibility, or creativity.⁶⁸ In addition, examiners noted that the bank's community development investment activities were excellent in the Providence MSA and good in Connecticut and New York.

3. *Service Test.* Fleet Bank received an "outstanding" rating under the service test overall and in the Boston MSA. Examiners reported that Fleet Bank offered a full range of banking services at its branches and that its branch offices and delivery systems provided access to financial products and services for consumers of different income levels.⁶⁹ They noted that Fleet Bank offered specific products designed for LMI individuals and LMI areas.⁷⁰ These products included a checking account, savings account, and unsecured installment loan that feature low monthly fees and no minimum balance. Fleet Bank also offered an electronic transaction account to provide lower cost banking options to individuals receiving federal benefits and to those who have not historically had bank accounts. Examiners commended Fleet Bank for being the first major bank in the Northeast to offer the electronic transaction account, which they described as supporting the bank's commitment to serve LMI individuals while focusing on underserved customers. Fleet Bank also offered the "First Community Bank" line of products and services designed for small businesses in LMI urban areas. In addition, examiners noted that Fleet Bank's community development services included first-time homebuyer, small business, money management, and basic banking seminars.

E. HMDA Data and Fair Lending Record

The Board also has carefully considered the lending records of Bank of America and FleetBoston in light of comments on HMDA data reported by their subsidiaries.⁷¹

68. One commenter criticized FleetBoston's loans to redevelop certain areas in Rhode Island as detrimental to LMI communities. These loans provided financing for market-rate housing to help revitalize and stabilize certain LMI communities in the state.

69. One commenter criticized FleetBoston for delaying the opening of a mortgage loan center in South Providence. FleetBoston has opened the lending center to serve this area.

70. One organization expressed concerns about FleetBoston's branch distribution in LMI and predominantly minority areas in Philadelphia, Pennsylvania. FleetBoston entered the Philadelphia area in 2001 through its acquisition of Summit Bancorp, Princeton, New Jersey. FleetBoston proposes to open one *de novo* branch in Philadelphia in 2004 in a predominantly minority census tract. Through its recent acquisition of Progress, FleetBoston has acquired another branch in a predominantly minority census tract in the Philadelphia MSA. By the end of 2004, FleetBoston had planned to increase its branches in LMI areas in the Philadelphia MSA from 15 to 21.

71. The Board analyzed 2001 and 2002 HMDA data for BA Bank and Fleet Bank. The Board reviewed HMDA-reportable loan originations for various MSAs individually, as well as for the metropolitan

The 2002 HMDA data indicate that Bank of America's percentage of total HMDA-reportable loan originations to borrowers in minority census tracts⁷² generally was comparable with or exceeded that of lenders in the aggregate in the areas reviewed.⁷³ Although Bank of America's denial disparity ratios⁷⁴ for African-American applicants generally were comparable with those ratios for lenders in the aggregate for total HMDA-reportable loans in the areas reviewed, its denial disparity ratios for Hispanic applicants generally were less favorable than those ratios for lenders in the aggregate. However, the 2002 data indicate that, in the majority Bank of America's statewide assessment areas, the bank's percentage of total HMDA-reportable loans originated to Hispanic applicants exceeded the percentage for the aggregate of lenders. These data also indicate that the bank's percentage of total HMDA-reportable loans originated to African Americans also exceeded or was comparable with the percentage for the aggregate of lenders in the majority of BA Bank's statewide assessment areas.

The 2002 HMDA data indicate that FleetBoston's percentage of total HMDA-reportable loan originations to borrowers in minority census tracts generally exceeded or was comparable with the aggregate lenders' percentage in the states where the bank operated. In addition, the bank's denial disparity ratios for African-American and Hispanic applicants generally were slightly higher than or comparable with those ratios for lenders in the aggregate for HMDA-reportable loans in the markets reviewed.

Although the HMDA data may reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups and persons at different income levels in certain local areas, the HMDA data generally do not indicate that Bank of America or FleetBoston is excluding any race or income segment of the population or geographic areas on a prohibited basis. The Board nevertheless is concerned when HMDA data for an institution indicate disparities in lending and believes that all banks are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending, but also equal access to credit by creditworthy applicants regardless of their race or income level. The Board recognizes, however, that HMDA data alone provide an incomplete measure of an institution's lending in its

portions of BA Bank's and Fleet Bank's assessment areas statewide. Commenters alleged that 2002 HMDA data indicate that BA Bank denied home mortgage loan applications from African Americans and Hispanics more frequently than applications from whites in MSAs in various states and the District of Columbia. Other commenters alleged that Fleet Bank denied home mortgage loan applications from African Americans and Hispanics more frequently than applications from whites in certain markets.

72. For purposes of this HMDA analysis, minority census tract means a census tract with a minority population of 80 percent or more.

73. The lending data of the lenders in the aggregate represent the cumulative lending for all financial institutions that have reported HMDA data in a particular area.

74. The denial disparity ratio equals the denial rate of a particular racial category (e.g., African Americans) divided by the denial rate for whites.

community because these data cover only a few categories of housing-related lending. HMDA data, moreover, provide only limited information about the covered loans.⁷⁵ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted adequately in meeting its community's credit needs or has engaged in illegal lending discrimination.

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide an onsite evaluation of compliance by the subsidiary depository institutions of Bank of America and FleetBoston with fair lending laws. Examiners noted no fair lending issues or concerns in the CRA performance evaluations of the depository institutions controlled by Bank of America or FleetBoston.

The record also indicates that Bank of America has taken steps to ensure compliance with fair lending laws. Bank of America has instituted corporate-wide policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations. Bank of America's compliance program includes compliance file reviews, an anti-predatory-lending policy, fair lending policy and product guides, testing the integrity of HMDA data, and quality assurance. In addition, Bank of America's consumer real estate associates receive compliance training that includes courses in fair lending laws, ethics, privacy, information security, and HMDA. Bank of America stated that its compliance program would be implemented at Fleet Bank after consummation of the proposal.

The Board also has considered the HMDA data in light of the programs described above and the overall performance records of Bank of America's subsidiary banks under the CRA. These established efforts demonstrate that the banks are active in helping to meet the credit needs of their entire communities.⁷⁶

F. Branch Closings

Several commenters expressed concerns about the proposal's possible effect on branch closings.⁷⁷ The Board has

carefully considered these comments on potential branch closings in light of all the facts of record. Bank of America has represented that any merger-related branch closings, relocations, or consolidations would be minimal because there is little geographic overlap with FleetBoston.⁷⁸ Bank of America also represented that no decision had been made on whether Bank of America's or FleetBoston's branch closure policy would be in effect after consummation of the proposed transaction. Under these policies, Bank of America and FleetBoston must review a number of factors before closing or consolidating a branch, including an assessment of the branch, the marketplace demographics, a profile of the community where the branch is located, and the effect on customers. The most recent CRA evaluations of BA Bank and Fleet Bank noted favorably the banks' records of opening and closing branches.⁷⁹

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.⁸⁰ Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory agency before closing a branch. In addition, the Board notes that the OCC, as the appropriate federal supervisor of BA Bank, will continue to review BA Bank's branch closing record in the course of conducting CRA performance evaluations.

G. Other Concerns

Some commenters urged the Board not to approve the proposal until Bank of America meets certain "commitments" regarding its Hawaii lending programs and its goal for mortgage lending to Native Hawaiians on Hawaiian Home Lands that commenters alleged Bank of America

of the deposits of insured depository institutions in the United States, Bank of America would divest branches in LMI areas to comply with section 3(d) of the BHC Act.

78. One commenter alleged that Bank of America has closed bank branches in the absence of market overlap after previous bank mergers. The commenter expressed concern that branches in LMI areas would be closed after consummation of this proposal.

79. Examiners stated that, in general, BA Bank's record of opening and closing branches did not adversely affect the accessibility of delivery systems, particularly in LMI geographies. BA Bank closed three branches in middle-income geographies in the Los Angeles–Long Beach MSA during the evaluation period. Examiners reported, however, that service delivery systems in the Los Angeles–Long Beach MSA were accessible to geographies and individuals of all income levels. Examiners stated that branch openings and closings in the Charlotte MSA did not adversely affect the accessibility of the bank's delivery systems in general or in LMI areas. BA Bank closed one branch in a low-income census tract in the Charlotte MSA during the review period, but another BA Bank branch was located less than one mile away. BA Bank also closed two branches in low-income census tracts and one branch in a moderate-income census tract in the Miami MSA.

80. Section 42 of the FDI Act (12 U.S.C. §1831r-1), as implemented by the Joint Policy Statement Regarding Branch Closings (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least 30-days notice and the appropriate federal supervisory agency with at least 90-days notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution's written policy for branch closings.

75. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

76. One commenter alleged that Bank of America has a substantially higher rate of home mortgage foreclosures in neighborhoods with predominantly minority and LMI populations and, generally, that these areas have the fewest Bank of America branches. Bank of America represented that it has policies and procedures in place to work with customers to minimize foreclosures. As previously noted, the OCC did not find fair lending issues or concerns when it conducted its fair lending law reviews during the CRA evaluations of the subsidiary depository institutions of Bank of America.

77. Some commenters expressed concern that, if consummation of the proposal caused Bank of America to control more than 10 percent

made in 1994 in connection with the acquisition of Liberty Bank, Honolulu, Hawaii, by Bank of America, FSB, a predecessor of BA Bank.⁸¹ Commenters alleged that the “commitments” were reaffirmed in *NationsBank*,⁸² and that they were conditions to the Board’s approval in both orders.

In connection with the acquisition of Liberty Bank, Bank of America publicly announced its plans to engage in certain lending programs in Hawaii. Although Bank of America styled these initiatives as “commitments” in its public statements, it did not make them as commitments to the Board, and these plans were not conditions to the Board’s approvals in *Liberty Bank* or *NationsBank*.⁸³ The Board views the enforceability of such third party pledges, commitments, or agreements as matters outside the CRA. As the Board explained in *NationsBank*, to gain approval of a proposal to acquire an insured depository institution an applicant must demonstrate a satisfactory record of performance under the CRA without reliance on plans or commitments for future action.⁸⁴ Moreover, the Board has consistently found that neither the CRA nor the federal banking agencies’ CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any organization.⁸⁵ Accordingly, in *Liberty Bank* and *NationsBank* and in this case as well, the Board has focused on the applicant’s existing record of helping to meet the credit needs of its CRA assessment areas when reviewing a proposal under the convenience and needs factor of the BHC Act.⁸⁶

As previously noted, many commenters criticized the terms of Bank of America’s recently announced Community Development Initiative. Some criticized it for providing insufficient funding for loans, investments, or grants. Others requested that the Board not approve the proposal until Bank of America includes state-specific goals for certain loan products and programs or enters into specific

agreements with certain states or community organizations. As discussed above, the Board views the enforceability of such third-party pledges, initiatives, and agreements as matters outside the CRA. Instead, the Board focuses on the existing CRA performance record of an applicant and the programs that the applicant has in place to serve the credit needs of its CRA assessment areas at the time the Board reviews a proposal under the convenience and needs factor. The future activities of Bank of America’s subsidiary depository institutions will be reviewed by the appropriate federal supervisors of those institutions in future CRA performance examinations, and the Board will consider that actual CRA performance record in future applications by Bank of America to acquire a depository institution.

H. Conclusion on Convenience and Needs Considerations

The Board recognizes that this proposal represents a significant expansion of Bank of America and its scope of activities. Accordingly, an important component of the Board’s review of the proposal has been its consideration of the effects of the proposal on the convenience and needs of all communities served by Bank of America and FleetBoston.

In conducting its review, the Board has weighed the concerns expressed by commenters in light of all the facts of record, including the overall CRA records of the depository institutions of Bank of America and FleetBoston. A significant number of commenters have expressed support for the proposal based on the records of Bank of America and FleetBoston in helping to serve the banking needs, and in particular, the lending needs of their entire communities, including LMI areas. Other commenters have expressed concern about specific aspects of Bank of America’s record of performance under the CRA in its current service areas and have expressed reservations about whether Bank of America and FleetBoston have been, and would be, responsive to the banking and credit needs of all their communities, especially in New England. The Board has carefully considered these concerns and weighed them against the overall CRA records of Bank of America and FleetBoston, reports of examinations of CRA performance, and information provided by Bank of America, including its responses to comments. The Board also considered information submitted by Bank of America and information from the OCC concerning BA Bank’s performance under the CRA and compliance with fair lending laws since its last CRA performance evaluation.

As discussed in this order, all the facts of record demonstrate that the subsidiary depository institutions of Bank of America and FleetBoston have a record of meeting the credit needs of their communities. The Board expects the resulting organization to continue to help serve the banking needs of all its communities, including LMI neighborhoods.

Based on all the facts of record, and for reasons discussed above, the Board concludes that considerations

81. See *Liberty Bank* at 628.

82. See *NationsBank* at 876.

83. Some commenters misconstrued the Board’s statements that the *Liberty Bank* and *NationsBank* orders were “specifically conditioned upon compliance with all of the commitments made by BankAmerica [or NationsBank] in connection with this application” as referencing commitments other than those that the applicants expressly made directly to the Board.

84. See *NationsBank* at 876; see also *Travelers Group Inc.*, 84 *Federal Reserve Bulletin* 985 (1998).

85. See, e.g., *Citigroup Inc.*, 88 *Federal Reserve Bulletin* 485 (2002); *Fifth Third Bancorp.*, 80 *Federal Reserve Bulletin* 838, 841 (1994).

86. The CRA performance records of Bank of America FSB, which had branches in Hawaii at the time of the *Liberty Bank* order and until eight months prior to the *NationsBank* order, were rated by its primary federal supervisor, the Office of Thrift Supervision, as “satisfactory” (*Liberty Bank*) and as “outstanding” overall and “satisfactory” in Hawaii (*NationsBank*). Bank of America’s CRA assessment areas have not included Hawaii since 1998, after it sold all its branches in that state. Under the interagency CRA regulation, the appropriate federal supervisor evaluates a bank’s CRA performance record in its delineated assessment areas, which generally include the census tracts where its main office, branches, and deposit-taking ATMs are located, and the surrounding census tracts where the bank has originated or purchased a substantial portion of its loans. See, e.g., 12 C.F.R. 228.41.

relating to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval of the proposal.

Foreign Activities

Bank of America also has requested the Board's consent under section 4(c)(13) of the BHC Act and section 211.9 of the Board's Regulation K (12 C.F.R. 211.9) to acquire certain FleetBoston foreign operations. In addition, Bank of America has provided notice under sections 25 and 25A of the Federal Reserve Act and sections 211.5 and 211.9 of Regulation K (12 C.F.R. 211.5 and 211.9) to acquire FleetBoston's companies organized under sections 25 and 25A of the Federal Reserve Act. The Board concludes that all the factors required to be considered under the Federal Reserve Act, the BHC Act, and the Board's Regulation K are consistent with approval of the proposal.

Requests for Additional Public Meetings

As noted above, the Board held public meetings on the proposal in Boston and San Francisco. A number of commenters requested that the Board hold additional public meetings or hearings, including at locations in Connecticut, Maine, New York, Pennsylvania, Rhode Island, and Hawaii. The Board has carefully considered these requests in light of the BHC Act, the Board's Rules of Procedure, and the substantial record developed in this case.⁸⁷

As previously discussed, more than 180 interested persons appeared and provided oral testimony at the two public meetings held by the Board. These attendees included elected representatives, the attorney general of Connecticut, members of community groups, and representatives of businesses and business groups from cities and towns across the country. In addition, the Board provided a period of more than 60 days for interested persons to submit written comments on the proposal. More than 2000 interested persons who did not testify at the public meetings provided written comments.

In the Board's view, all interested persons had ample opportunity to submit their views on this proposal. Numerous commenters, in fact, submitted substantial materials that have been carefully considered by the Board in acting on the proposal. Commenters requesting additional public meetings have failed to show why their written comments do not adequately present their views, evidence, and allegations. They also have not shown why the public meetings in Boston and San Francisco and the more than 60-day comment period did not provide an adequate opportunity for all interested parties to present their views and concerns. For these reasons, and based on all the facts of record, the Board has determined that additional public

meetings or hearings are not required and are not necessary or warranted to clarify the factual record on the proposal.⁸⁸ Accordingly, the requests for additional public meetings or hearings are hereby denied.

Conclusion

Based on the foregoing, and in light of all the facts of record, the Board has determined that the applications and notices should be, and hereby are, approved. In reaching this conclusion, the Board has carefully considered all oral testimony and the written comments regarding the proposal in light of the factors it is required to consider under the BHC Act and other applicable statutes.⁸⁹

88. A number of commenters requested that the Board delay action on the proposal or extend the comment period until:

- (i) Bank of America provides more detail about its Community Development Initiative;
- (ii) Bank of America enters into a written, detailed, and publicly verifiable CRA agreement negotiated with community groups;
- (iii) Bank of America fulfills certain commitments to third parties other than the Board;
- (iv) Bank of America enters into new CRA agreements with local community groups;
- (v) pending lawsuits or investigations involving Bank of America and FleetBoston are resolved; or
- (vi) alleged conflicts of interests are resolved.

The Board believes that the record in this case does not warrant postponement of its consideration of the proposal. During the application process, the Board has accumulated a significant record, including reports of examination, supervisory information, public reports and information, and considerable public comment. The Board believes this record is sufficient to allow it to assess the factors it is required to consider under the BHC Act. The BHC Act and the Board's rules establish time periods for consideration and action on proposals such as the current proposal. Moreover, as discussed more fully above, the CRA requires the Board to consider the existing record of performance of an organization and does not require that the organization enter into contracts or agreements with others to implement its CRA programs. For the reasons discussed above, the Board believes that commenters have had ample opportunity to submit their views and, in fact, they have provided substantial written submissions and oral testimony that have been considered carefully by the Board in acting on the proposal. Based on a review of all the facts of record, the Board concludes that delaying consideration of the proposal, granting another extension of the comment period, or denying the proposal on the grounds discussed above, including for informational insufficiency, is not warranted.

89. One commenter requested that certain Federal Reserve System staff and Board members recuse themselves from consideration of the applications or, alternatively, that the applications be dismissed, because of commenter's allegations that conflicts of interests exist between Federal Reserve System staff and Bank of America. The commenter claimed that federal ethics laws and/or rules were violated because an officer of the Federal Reserve Bank of Richmond or other staff, including an unidentified Board member, have mortgages on their residences from BA Bank. Federal law prohibits a bank examiner from accepting a loan from a bank or other covered entity that he or she examines. See 18 U.S.C. §213. In this case, the individual in question has never examined a bank that is the subject of these applications, and review of an application is not itself an examination for purposes of 18 U.S.C. §213. Neither the ethics rules governing Reserve Bank supervisory staff who participate in matters other than examinations and inspections nor the Board's ethics rules as promulgated by the Office of Government Ethics require an individual who already has a loan from an institution to be recused from considering

87. Section 3(b) of the BHC Act does not require that the Board hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. 12 U.S.C. §1842(b). In this case, the Board has not received such a recommendation from any state or federal supervisory authority.

Approval of the applications and notices is specifically conditioned on compliance by Bank of America with all the commitments made to the Board in connection with the proposal and with the conditions stated or referred to in this order. For purposes of this transaction, these commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The acquisition of FleetBoston's subsidiary banks shall not be consummated before the fifteenth calendar day after the effective date of this order, and no part of the proposal shall be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

By order of the Board of Governors, effective March 8, 2004.

Voting for this action: Chairman Greenspan and Governors Gramlich, Bies, Olson, Bernanke, and Kohn. Absent and not voting: Vice Chairman Ferguson.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

Appendix A

Calculation of the Nationwide Deposit Cap

For purposes of applying the nationwide deposit cap, the total amount of deposits held by insured banks in the United States was computed by first calculating the sum of total deposits in domestic offices as reported on Schedule RC of the Call Report, interest accrued and unpaid on deposits in domestic offices as reported on Schedule RC-G of the Call Report, and adding the following items reported on Schedule RC-O of the Call Report: unposted credits, uninvested trust funds, deposits in insured branches in Puerto Rico and U.S. territories and possessions, unamortized discounts on deposits, the amount by which demand deposits would be increased if the reporting institution's reciprocal demand balances with foreign banks and foreign offices of other U.S. banks that were reported on a net basis had been reported on a gross basis, amount of assets netted against demand deposits, amount of assets netted against time and savings deposits, demand deposits of consolidated subsidiaries, time and savings deposits of consolidated subsidiaries and interest accrued and unpaid on deposits of consolidated subsidiaries. Then, subtract the amount of unpaid debits and unamortized premiums from this sum.

an applications matter involving that institution or its affiliate. *See, e.g.*, 5 C.F.R. 6801.107–108. The Board has carefully considered this request and concludes that no conflicts of interests exist that require recusal or dismissal of the applications.

The total amount of deposits held by insured U.S. branches of foreign banks was computed by first calculating the sum of the following items reported on Schedule O of the RAL: total demand deposits in the branch, total time and savings deposits in the branch, interest accrued and unpaid on deposits in the branch, unposted credits, demand deposits of majority-owned depository subsidiaries and wholly owned nondepository subsidiaries, time and savings deposits of majority-owned depository subsidiaries and wholly owned nondepository subsidiaries, and interest accrued and unpaid on deposits of majority-owned depository subsidiaries and wholly owned nondepository subsidiaries, the amount by which demand deposits would be increased if the reporting institution's reciprocal demand balances with foreign banks and foreign offices of other U.S. banks that were reported on a net basis had been reported on a gross basis, amount of assets netted against demand deposits, amount of assets netted against time and savings deposits, demand deposits of consolidated subsidiaries, time and savings deposits of consolidated subsidiaries. Then, subtract the amount of unpaid debits from this sum.

The total amount of deposits held by insured savings associations in the United States was computed by taking the sum of total deposits in domestic offices as reported on Schedule SC of the TFR, deposits held in escrow and accrued interest payable-deposits, both as reported on Schedule SC of the TFR, plus the following items reported on Schedule SI of the TFR: time and savings deposits of consolidated subsidiaries, outstanding checks drawn against Federal Home Loan Banks and Federal Reserve Banks, demand deposits of consolidated subsidiaries, assets netted against demand deposits, and assets netted against time and savings deposits.

Because insured banks and savings associations that are subsidiaries of other insured banks and savings associations have been consolidated into their parent institution for reporting purposes, the individual data for these institutions have not been added in order to avoid double counting deposits held by these subsidiary insured depository institutions.

Appendix B

Banking Markets in which Bank of America and FleetBoston Compete Directly

A. Metropolitan New York–New Jersey

Bronx, Dutchess, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester Counties, all in New York; Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, Union, and Warren Counties and the northern portions of Mercer County, all in New Jersey; Pike County, Pennsylvania; Fairfield County and portions of Litchfield and New Haven Counties, all in Connecticut.

B. Fort Pierce, Florida

St. Lucie and Martin Counties, except the towns of Indian-town and Hobe Sound in Martin County.

C. Sarasota, Florida

Manatee and Sarasota Counties, except the portion of Sarasota County that is both east of the Myakka River and south of Interstate 75 (currently the town of Northport); the portion of Charlotte County that is west of both the harbor and the Myakka River (currently the towns of Englewood, Englewood Beach, New Point Comfort, Grove City, Cape Haze, Rotonda, Rotonda West, and Placida); and Gasparilla Island (the town of Boca Grande) in Lee County.

D. West Palm Beach, Florida

Palm Beach County east of Loxahatchee and the towns of Indiantown and Hobe Sound in Martin County.

Appendix C

Market Data

Metropolitan New York–New Jersey

Bank of America operates the 27th largest depository institution in the market, controlling deposits of approximately \$2.9 billion, representing less than 1 percent of market deposits. FleetBoston operates the third largest depository institution in the market, controlling deposits of approximately \$45.9 billion, representing approximately 8 percent of market deposits. On consummation of the proposal, Bank of America would operate the third largest depository institution in the market, controlling deposits of \$48.9 billion, representing approximately 9 percent of market deposits. Two hundred and seventy one institutions would remain in the market. The HHI would increase 9 points to 983.

*Florida**Fort Pierce*

Bank of America operates the third largest depository institution in the market, controlling deposits of approximately \$611 million, representing less than 1 percent of market deposits. FleetBoston opened a *de novo* branch in the market in January 2004. Bank of America has 18 branches in this banking market. FDIC deposit data reflecting the deposits of FleetBoston's branch are not yet available. The Board has considered Bank of America's deposits in the Fort Pierce banking market, the number of competing institutions, and the deposits controlled by those institutions, and the recent entry of FleetBoston's branch. Based on these factors, the Board concludes that consummation of the proposal would have a *de minimis* effect in the Fort Pierce banking market. The HHI is 1,259.

Sarasota

Bank of America operates the largest depository institution in the market, controlling deposits of approximately \$3.2 billion, representing approximately 26 percent of market deposits. FleetBoston operates the 44th largest depository institution in the market, controlling deposits of approximately \$8.6 million, representing less than 1 percent of market deposits. On consummation, Bank of America would continue to operate the largest depository institution in the market, controlling deposits of \$3.2 billion, representing approximately 26.1 percent of the market deposits. Forty-seven depository institutions would remain in the banking market. The HHI would increase 4 points to 1,252.

West Palm Beach

Bank of America operates the second largest depository institution in the market, controlling deposits of approximately \$4 billion, representing approximately 20 percent of market deposits. FleetBoston operates the 17th largest depository institution in the market, controlling deposits of approximately \$166 million, representing less than 1 percent of market deposits. On consummation of the proposal, Bank of America would continue to operate the second largest depository institution in the market, controlling deposits of approximately \$4.1 billion, representing approximately 21 percent of market deposits. Sixty depository institutions would remain in market. The HHI would increase 35 points to 1,349.

*National City Corporation
Cleveland, Ohio*

Order Approving the Acquisition of a Bank Holding Company

National City Corporation ("National City"), a financial holding company within the meaning of the Bank Holding Company Act ("BHC Act"), has requested the Board's approval under section 3 of the BHC Act (12 U.S.C. § 1842) to acquire Allegiant Bancorp, Inc. ("Allegiant") and its subsidiary bank, Allegiant Bank ("Allegiant Bank"), both in St. Louis, Missouri. National City also has requested the Board's approval under sections 4(c)(8) and 4(j) of the BHC Act (12 U.S.C. §§ 1843(c)(8) and 1843(j)) and sections 225.28(b)(2), (6) and (12) of the Board's Regulation Y (12 C.F.R. 225.28(b)(2), (6), and (12)) to acquire certain nonbanking subsidiaries of Allegiant and thereby engage in permissible activities related to extending credit, providing investment advice, and engaging in community development.

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (68 *Federal Register* 68,626 (2003)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in sections 3 and 4 of the BHC Act.

National City is the 13th largest commercial banking organization in the United States with total consolidated assets of \$113.9 billion, representing approximately 1.4 percent of total assets of insured banking organizations in the United States.¹ National City operates subsidiary insured depository institutions in Illinois, Indiana, Kentucky, Michigan, Ohio, and Pennsylvania. Allegiant, with assets of approximately \$2.3 billion, is the eighth largest commercial banking organization in Missouri. On consummation of this proposal, National City would remain the 13th largest commercial banking organization in the United States with total consolidated assets of \$116.2 billion, representing approximately 1.4 percent of total assets of insured banking organizations in the United States.

Interstate Analysis

Section 3(d) of the BHC Act allows the Board to approve an application by a bank holding company to acquire control of a bank located in a state other than the home state of such bank holding company if certain conditions are met.² For purposes of the BHC Act, the home state of National City is Ohio, and Allegiant Bank is located in Missouri. Based on a review of all the facts of record, including relevant state statutes, the Board finds that all the conditions for an interstate acquisition enumerated in section 3(d) are met in this case.³

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market, unless the Board finds that the anticompetitive effects of the proposal clearly are out-

weighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁴ National City and Allegiant do not compete directly in any relevant banking market. Accordingly, the Board concludes, based on all the facts of record, that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of banking resources in any relevant banking market and that competitive considerations are consistent with approval.

Financial and Managerial Considerations

Section 3 of the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and banks involved in the proposal and certain other supervisory factors. The Board has carefully considered these factors in light of all the facts of record, including reports of examination, other confidential supervisory information received from the primary federal banking agency that supervises each institution, information provided by National City, and public comment on the proposal.

National City is and will remain well capitalized on consummation of the proposal. In addition, the Board has consulted with the Office of the Comptroller of the Currency ("OCC"), the primary federal supervisor of National City's lead banks, concerning the proposal.⁵ The Board also has considered the managerial resources and the examination records of National City and Allegiant and the subsidiary depository institutions to be acquired, including their risk management systems and other policies.⁶ Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of National City, Allegiant, and Allegiant Bank are consistent with approval, as are the other supervisory factors under the BHC Act.⁷

1. Asset data are as of December 31, 2003, and nationwide ranking data are as of September 30, 2003.

2. A bank holding company's home state is the state in which the total deposits of all subsidiary banks of the company were the largest on the later of July 1, 1966, or the date on which the company became a bank holding company. 12 U.S.C. § 1841(o)(4)(C). For purposes of section 3(d) of the BHC Act, the Board considers a bank to be located in the states in which the bank is chartered, headquartered, or operates a branch.

3. See 12 U.S.C. §§ 1842(d)(1)(A) and (B), 1842(d)(2)(A) and (B). National City is adequately capitalized and adequately managed, as defined by applicable law. In addition, on consummation of the proposal, National City would control less than 10 percent of the total amount of deposits of insured depository institutions in the United States. Missouri law prohibits a bank holding company from acquiring an insured depository institution in Missouri if, as a result of the acquisition, the bank holding company would control more than 13 percent of state deposits. See Mo. Rev. Stat. § 362.915. This transaction would meet Missouri's state deposit cap. Missouri law prohibits the interstate acquisition of a Missouri bank that has existed for fewer than 5 years. This transaction would meet Missouri's minimum age requirements. See *id.* at § 362.077. The other requirements of section 3(d) also would be met on consummation of the proposal.

4. 12 U.S.C. § 1842(c)(1).

5. A commenter cited press reports about a class-action lawsuit and other litigation concerning the consumer lending and trust activities of three National City subsidiaries. The Board notes that the class-action lawsuit was settled in 2002. In addition, National City has submitted information on pending material litigation relating to the consumer lending activities of National City and its affiliates. The Board has considered this information in light of confidential supervisory information and has consulted with the OCC.

6. The commenter also cited press reports noting that in 2003, the Securities and Exchange Commission ("SEC") directed National City to provide certain information on its mutual fund activities as part of an industry-wide review of practices. The Board notes that the SEC has taken no action against National City on this matter.

7. The commenter also criticized National City for lobbying against state and local efforts to enact and enforce anti-predatory lending laws and ordinances. In addition, the commenter, citing press reports, expressed concern that the proposal might result in a loss of jobs. The Board notes that the commenter does not allege and has provided no evidence that National City engaged in any illegal activity or other action that has affected, or may reasonably be expected to affect, the safety and soundness of the institutions involved in this proposal or the competitive or other factors that the Board must consider under the BHC Act.

Convenience and Needs Considerations

In acting on a proposal under section 3 of the BHC Act, the Board is required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institution under the Community Reinvestment Act ("CRA").⁸ The CRA requires the federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of local communities in which they operate, consistent with their safe and sound operation, and requires the appropriate federal financial supervisory agency to take into account an institution's record of meeting the credit needs of its entire community, including low- and moderate-income ("LMI") neighborhoods, in evaluating bank expansionary proposals.

The Board has considered carefully the convenience and needs factor and the CRA performance records of the banks of National City and Allegiant in light of all the facts of record, including public comment on the proposal. A commenter opposing the proposal asserted, based on data reported under the Home Mortgage Disclosure Act ("HMDA"),⁹ that National City engages in discriminatory treatment of African-American and Hispanic individuals in its home mortgage lending operations. In addition, the commenter expressed concern about potential branch closings.

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the convenience and needs factor in light of the evaluations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹⁰ At their most recent CRA evaluations by the OCC, National City Bank, Cleveland ("NC Bank"), National City's largest bank as measured by total deposits, received an "outstanding" rating, and National City Bank of Indiana, Indianapolis ("NC Indiana"), National City's largest bank as measured by total assets, received a "satisfactory" rating.¹¹ In addition, National City's five other subsidiary banks received either "outstanding" or "satisfactory" ratings at their most recent CRA evaluations.¹²

Allegiant Bank, Allegiant's only subsidiary bank, received a "satisfactory" rating at its most recent CRA performance evaluation by the Federal Deposit Insurance Corporation ("FDIC"), as of March 1, 2002. National City

has indicated that on consummation of the proposal, Allegiant Bank would have access to National City's CRA program, would offer certain National City CRA-related loan products, and would establish a CRA program comparable to those of National City's subsidiary banks. National City anticipates integrating Allegiant's community development activities with the National City Community Development Corporation. In addition, Allegiant Bank would be subject to National City's corporate-wide compliance program.

NC Bank's most recent CRA evaluation characterized its overall record of home mortgage and small business lending as excellent,¹³ noting specifically the bank's excellent loan penetration among borrowers of different income levels, including LMI individuals. Examiners also praised the bank's level of community development lending and noted favorably the use of several flexible lending products designed to address affordable housing needs of LMI individuals. Examiners commended the bank's level of qualified investments and reported that these investments were highly responsive to the credit needs of its assessment area. In addition, examiners reported that NC Bank's community development services were excellent and praised the distribution of the bank's branches.

At NC Indiana's most recent CRA performance evaluation, examiners commended the bank's home lending record among borrowers of different income levels. In addition, examiners praised the bank's record of community development lending and its use of innovative loan products. NC Indiana's most recent evaluation also commended its strong level of qualified investments noting that the bank created opportunities for and engaged in complex and innovative investments in its assessment area. In addition, examiners characterized the distribution of NC Indiana's branches throughout its assessment area, including LMI geographies, as excellent.

Examiners at Allegiant Bank's most recent CRA performance evaluation concluded that the bank demonstrated a good record of serving the credit needs of its entire community, including the most economically disadvantaged portions of its assessment area. Examiners commended Allegiant Bank's home mortgage lending record and noted that in 2000, the percentage of loans extended by the bank in LMI geographies exceeded the percentage extended by the aggregate of lenders ("aggregate lenders").¹⁴ Examiners also noted Allegiant Bank's significant level of qualified investments and reported that such investments supported a wide variety of programs to develop LMI housing.

13. In evaluating the records of performance under the CRA of NC Bank and NC Indiana, examiners considered home mortgage loans by certain affiliates in the banks' assessment areas. The loans reviewed by examiners included loans reported by National City Mortgage Corporation, Miamisburg, Ohio ("NC Mortgage") (a subsidiary of NC Indiana); National City Mortgage Services, Kalamazoo, Michigan ("NC Mortgage Services") (a subsidiary of National City Bank of Michigan/Illinois, Bannockburn, Illinois); and other bank and non-bank affiliates of NC Bank.

14. The lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a given area.

8. 12 U.S.C. § 2901 *et seq.*

9. 12 U.S.C. § 2801 *et seq.*

10. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001).

11. Both ratings are as of February 22, 2000.

12. The Appendix lists the most recent CRA ratings of the National City subsidiary banks.

B. HMDA and Fair Lending Record

The Board has carefully considered the lending records of and HMDA data reported by National City in light of public comment. Based exclusively on a review of 2002 HMDA data, the commenter alleged that National City engages in discriminatory lending by directing minority customers to First Franklin Financial Corporation, San Jose, California ("First Franklin"), a subsidiary of NC Indiana that originates home mortgage loans that include subprime loans,¹⁵ rather than to National City's subsidiary banks.¹⁶ The commenter also alleged that the denial disparity ratios¹⁷ of some of National City's subsidiary banks in certain markets indicated that the banks disproportionately denied African-American or Hispanic applicants for home mortgage loans.

The Board reviewed HMDA data reported by all of National City's bank and nonbank lending subsidiaries in the MSAs identified by the commenter, and focused its analysis on the data in the MSAs that include six major assessment areas of the banks. The Board compared the HMDA data of First Franklin with aggregate data submitted by the other subsidiaries of National City engaged in home mortgage lending, including its subsidiary banks, NC Mortgage, and NC Mortgage Services ("National City Lenders").

The 2002 HMDA data indicate that, although the National City Lenders extended a smaller percentage of their total HMDA-reportable loans to African-American borrowers than did First Franklin in the MSAs reviewed, they extended a larger number of such loans to African-American borrowers than did First Franklin in the majority of the MSAs. The data also indicate that the percentages of the National City Lenders' HMDA-reportable loans to Hispanics were comparable to or exceeded the percentages for First Franklin in each of the MSAs reviewed, and that they originated a larger number of HMDA-reportable loans

to Hispanic borrowers than did First Franklin in each of the MSAs. In addition, the denial disparity ratios of the National City Lenders for African-American and Hispanic applicants for total HMDA-reportable loans approximated or were lower than those of aggregate lenders in a majority of the MSAs reviewed. Moreover, the National City Lenders' origination rates for total HMDA-reportable loans to Hispanics and African Americans were comparable to or exceeded the rates for aggregate lenders in each of the MSAs reviewed.¹⁸

The Board is concerned when the record of an institution indicates disparities in lending and believes that all banks are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending, but also equal access to credit by creditworthy applicants regardless of race or income level. The Board recognizes, however, that HMDA data alone provide an incomplete measure of an institution's lending in its community because these data cover only a few categories of housing-related lending and provide only limited information about covered loans.¹⁹ Moreover, HMDA data indicating that one affiliate is lending to minorities or LMI individuals more than another affiliate do not, without more information, indicate that either affiliate has engaged in illegal discriminatory lending activities.

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide on-site evaluations of compliance with fair lending laws by National City's banks and their lending subsidiaries, including First Franklin. Examiners found no evidence of prohibited discrimination or other illegal credit practices at any of National City's subsidiary banks or the lending subsidiaries of these banks at their most recent CRA performance evaluations.

The record also indicates that National City has taken several affirmative steps to ensure compliance with fair lending laws. National City has a centralized compliance function and has implemented corporate-wide compliance policies and procedures to help ensure that all National City business lines, including First Franklin's, comply with all fair lending and other consumer protection laws and regulations. It employs compliance officers and staff responsible for compliance training and monitoring and conducts file reviews for compliance with federal and state consumer protection rules and regulations for all product lines and origination sources, including First Franklin. National City also regularly performs self-assessments of

15. As the Board previously has noted, subprime lending is a permissible activity that provides needed credit to consumers who have difficulty meeting conventional underwriting criteria. The Board continues to expect all bank holding companies and their affiliates to conduct their subprime lending operations without any abusive lending practices. See *Royal Bank of Canada*, 88 *Federal Reserve Bulletin* 385, 388 n.18 (2002). The Board also notes that the OCC has responsibility for enforcing compliance with fair lending laws by national banks and their subsidiaries.

16. Specifically, the commenter compared 2002 HMDA data reported by First Franklin and a National City subsidiary bank in the Metropolitan Statistical Areas ("MSAs") that include six of the largest assessment areas of National City's subsidiary banks (as determined by total deposits). These areas include the Chicago, Cleveland, Detroit, Indianapolis, Louisville, and Pittsburgh MSAs. The comparison did not include HMDA data reported by other National City lending subsidiaries operating in these areas. The commenter asserted that in 2002, First Franklin originated a higher volume and larger percentage of its HMDA-reportable loans to African-American or Hispanic borrowers than the National City subsidiary bank in each of the areas. The commenter made similar allegations concerning two MSAs outside the banks' assessment areas.

17. The denial disparity ratio equals the denial rate for a particular racial category (for example, African American) divided by the denial rate for whites.

18. The origination rate equals the total number of loans originated to applicants of a particular racial category divided by the total number of applications received by members of that racial category.

19. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was in fact creditworthy. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

its fair lending law compliance and fair lending policy training for its employees.

The Board also has considered the HMDA data in light of other information, including the CRA performance records of National City's subsidiary banks. These records demonstrate that National City is active in helping to meet the credit needs of its entire community.

C. Branch Closings

The Board has considered the commenter's concerns about potential branch closings in light of all the facts of record. National City has provided the Board with its branch closing policy and has represented to the Board that it intends to open thirteen new branches in the St. Louis market over the next three years. The Board has considered carefully National City's branch closing policy and its record of opening and closing branches. Examiners reviewed National City's branch closing policy as part of the most recent CRA evaluations of each of National City's banks and found that it complied with federal law.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.²⁰ Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisory before closing a branch. In addition, the Board notes that the FDIC, as the appropriate federal supervisor of Allegiant Bank, will continue to review its branch closing record in the course of conducting CRA performance evaluations.

D. Conclusion on Convenience and Needs Factor

The Board has carefully considered all the facts of record, including reports of examination of the CRA records of the institutions involved, information provided by National City, public comment on the proposal, and confidential supervisory information. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval.

Nonbanking Activities

National City also has filed a notice under sections 4(c)(8) and 4(j) of the BHC Act to acquire the nonbanking subsidiaries of Allegiant. The subsidiaries engage in activities related to extending credit, providing investment advice,

and engaging in community development. The Board has determined by regulation that these activities are permissible for bank holding companies under the Board's Regulation Y,²¹ and National City has committed to conduct these activities in accordance with the Board's regulations and orders for bank holding companies engaged in these activities.

To approve the notice, the Board must determine that the acquisition of the nonbanking subsidiaries of Allegiant and the performance of the proposed activities by National City "can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."²² As part of its evaluation of these factors, the Board has considered the financial and managerial resources of National City and its subsidiaries, and the companies to be acquired, and the effect of the proposed transaction on those resources. For the reasons noted above, and based on all the facts of record, the Board has concluded that financial and managerial considerations are consistent with approval of the notice.

The Board also has considered the competitive effects of National City's proposed acquisition of the nonbanking subsidiaries of Allegiant in light of all the facts of record. National City and Allegiant compete directly in activities related to extending credit and providing investment advice. The markets for these activities are regional or national in scope and are unconcentrated.²³ The record in this case also indicates that there are numerous providers of these services. Based on all the facts of record, the Board concludes that consummation of the proposal would have a *de minimis* effect on competition for the proposed activities. Accordingly, the Board concludes that it is unlikely that significantly adverse competitive effects would result from the acquisition of Allegiant's nonbanking subsidiaries.

National City has indicated that the proposal would provide customers of the two organizations with access to services across a broader geographic area. National City has also asserted that customers of Allegiant would gain access to a broader variety of nonbanking services, such as trust and securities broker-dealer services. National City has represented that it intends to integrate Allegiant's community development operations with National City's community development subsidiary and expand such activities in the communities served by Allegiant.

Based on all the facts of record, the Board has determined that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects under the standard of section 4 of the BHC Act.

20. Section 42 of the Federal Deposit Insurance Act (12 U.S.C. § 1831r-1), as implemented by the Joint Policy Statement Regarding Branch Closings (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least 30 days' notice and the appropriate federal supervisory agency and customers of the branch with at least 90 days' notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution's written policy for branch closings.

21. See 12 C.F.R. 225.28(b)(2), (6), and (12).

22. See 12 U.S.C. § 1843(j)(2)(A).

23. In addition, National City and Allegiant engage in community development activities. The market for community development activities is local, but National City and Allegiant do not compete directly in any local market.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the application and notice should be, and hereby are, approved.²⁴ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes. The Board's approval is specifically conditioned on compliance by National City with the conditions imposed in this order and

24. A commenter requested that the Board hold a public meeting or hearing on the proposal. Section 3(b) of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for the bank to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from the appropriate supervisory authorities. Under its regulations, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony. 12 C.F.R. 225.16(e). Section 4 of the BHC Act and the Board's regulations provide for a hearing on a notice to acquire nonbanking companies if there are disputed issues of material fact that cannot be resolved in some other matter. 12 C.F.R. 225.25(a)(2). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the commenter has had ample opportunity to submit its views and has submitted written comments that have been considered carefully by the Board in acting on the proposal. The commenter's request fails to demonstrate why written comments do not present its evidence adequately and fails to identify disputed issues of fact that are material to the Board's decision that would be clarified by a public meeting or hearing. For these reasons, and based on all the facts of record, the Board has determined that a public meeting or hearing is not required or warranted in this case. Accordingly, the request for a public meeting or hearing on the proposal is denied.

the commitments made to the Board in connection with the application and notice, including compliance with state law. The Board's approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c) (12 C.F.R. 225.7 and 225.25(c)), and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with and to prevent evasion of the provisions of the BHC Act and the Board's regulations and orders issued thereunder. The commitments made in the application process are deemed to be conditions imposed in writing by the Board in connection with its findings and decisions and, as such, may be enforced in proceedings under applicable law.

The acquisition of Allegiant Bank may not be consummated before the fifteenth calendar day after the effective date of this order, and the proposal may not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or the Federal Reserve Bank of Cleveland, acting pursuant to delegated authority.

By order of the Board of Governors, effective March 15, 2004.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DE V. FRIERSON
Deputy Secretary of the Board

Appendix

CRA Performance Evaluations of National City

Subsidiary Bank	CRA Rating	Date	Supervisor
1. National City Bank, Cleveland, Ohio	Outstanding	February 2000	OCC
2. National City Bank of Indiana, Indianapolis, Indiana	Satisfactory	February 2000	OCC
3. The Madison Bank and Trust Company, Madison, Indiana	Outstanding	October 1999	FDIC
4. National City Bank of Kentucky, Louisville, Kentucky	Satisfactory	February 2000	OCC
5. National City Bank of Michigan/Illinois, Bannockburn, Illinois	Outstanding	February 2000	OCC
6. National City Bank of Pennsylvania, Pittsburgh, Pennsylvania	Outstanding	February 2000	OCC
7. National City Bank of Southern Indiana, New Albany, Indiana	Satisfactory	February 2000	OCC

*NewAlliance Bancshares, Inc.
New Haven, Connecticut*

Order Approving the Formation of a Bank Holding Company and the Acquisition of a Bank Holding Company and a Savings Association

NewAlliance Bancshares, Inc. (In Formation) (“NewAlliance”) has requested the Board’s approval pursuant to section 3 of the Bank Holding Company Act (12 U.S.C. § 1842) (“BHC Act”) to become a bank holding company by acquiring New Haven Savings Bank, New Haven, Connecticut (“NHSB”), and Alliance Bancorp of New England (“Alliance”) and Tolland Bank (“Tolland Bank”), both in Vernon, Connecticut. NewAlliance also has requested the Board’s approval pursuant to section 4(c)(8) and 4(j) of the BHC Act (12 U.S.C. § 4(c)(8) and 4(j)) and section 225.24 of the Board’s Regulation Y (12 C.F.R. 225.24)¹ to acquire Connecticut Bancshares, Inc. and The Savings Bank of Manchester (“SBM”), both in Manchester, Connecticut.²

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published (68 *Federal Register* 64,109 (2003)). The time for filing comments has expired, and the Board has considered the proposal and all comments received in light of the factors set forth in the BHC Act.

NHSB is the eighth largest depository organization in Connecticut and controls approximately \$1.9 billion in deposits, representing approximately 2.7 percent of total deposits in depository institutions in the state (“state deposits”).³ SBM is the 11th largest depository organization in Connecticut, controlling approximately \$1.7 billion in deposits, representing approximately 2.4 percent of state deposits. Tolland Bank is the 29th largest depository organization in Connecticut, controlling approximately \$336 million in deposits, representing less than 1 percent of state deposits. On consummation of the proposal, NewAlliance would be the fifth largest depository organization in Connecticut, controlling approximately \$3.9 billion in deposits, representing approximately 5.5 percent of state deposits.

1. NHSB, Tolland Bank, and SBM are chartered as Connecticut state savings banks. SBM does not meet the definition of “bank” for purposes of the BHC Act, because it is deemed to be a savings association under section 10(l) of the Home Owners’ Loan Act. See 12 U.S.C. §§ 1467a(l), 1841(c) and (j).

2. This proposal involves the conversion of NHSB from mutual to stock form and the merger of SBM and Tolland Bank into NHSB under the new name NewAlliance Bank. The Federal Deposit Insurance Corporation (“FDIC”) has notified NHSB of its intention not to object to the conversion of NHSB from mutual to stock form, and the Connecticut Department of Banking has approved the conversion of NHSB to stock form. NewAlliance has filed an application under the Bank Merger Act (12 U.S.C. § 1828(c)) with the FDIC and an application with the Connecticut Department of Banking to complete the various mergers.

3. State deposits and ranking data are as of June 30, 2003. In this context, depository institutions include commercial banks, savings associations, and savings banks.

Factors Governing Board Review of the Transaction

The BHC Act sets forth the factors that the Board must consider when reviewing the formation of a bank holding company or the acquisition of banks. These factors are the competitive effects of the proposal in the relevant geographic markets; the financial and managerial resources and future prospects of the companies and banks involved in the proposal; the convenience and needs of the community to be served, including the records of performance of insured depository institutions involved in the transaction under the Community Reinvestment Act (12 U.S.C. § 2901 *et seq.*) (“CRA”); and the availability of information needed to determine and enforce compliance with the BHC Act and other applicable law.⁴

The Board previously has determined by regulation that the operation of a savings association by a bank holding company is closely related to banking for purposes of section 4(c)(8) of the BHC Act.⁵ In reviewing the proposal, the Board is required by section 4(j)(2)(A) of the BHC Act to determine that the acquisition of SBM by NewAlliance “can reasonably be expected to produce benefits to the public . . . that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.”⁶ As part of its evaluation of a proposal under these public interest factors, the Board reviews the financial and managerial resources of the companies involved and the effect of the proposal on competition in the relevant markets. In acting on notices to acquire a savings association, the Board also reviews the records of performance of the relevant insured depository institutions under the CRA.

Competitive Considerations

Section 3 of the BHC Act prohibits the Board from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant banking market. The BHC Act also prohibits the Board from approving a proposed bank acquisition that would substantially lessen competition in any relevant banking market unless the anticompetitive effects of the proposal are clearly outweighed in the public interest by the probable effect of the proposal in meeting the convenience and needs of the community to be served.⁷ The Board also must consider the competitive effects of the proposal in the relevant markets under section 4 of the BHC Act in light of all the facts of record.

NewAlliance proposes to acquire SBM and Tolland Bank, which currently compete in the Hartford, Connecticut, banking market.⁸ Consummation of the proposal would be consistent with the Department of Justice Merger

4. 12 U.S.C. § 1842(c).

5. 12 C.F.R. 225.28(b)(4)(ii).

6. 12 U.S.C. § 1843(j)(2)(A).

7. 12 U.S.C. § 1842(c)(1).

8. The Hartford banking market is defined as the Hartford–New Britain–Ranally Metropolitan Area.

Guidelines (“DOJ Guidelines”) and Board precedent.⁹ Although the market would remain highly concentrated after consummation, as measured by the HHI, the change in market shares and market structure would be small and numerous competitors would remain in the market.¹⁰ The Department of Justice has advised the Board that consummation of the proposal is not likely to have a significantly adverse effect on competition in any relevant banking market.

Based on the facts of record, the Board concludes that consummation of the proposal would not have a significantly adverse effect on competition or on the concentration of banking resources in the Hartford banking market or any other relevant banking market, and that competitive considerations are consistent with approval.

Financial, Managerial, and Other Supervisory Factors

In applications and notices involving the acquisition of an insured depository institution, the BHC Act requires the Board to consider the financial and managerial resources and future prospects of the companies and depository institutions involved in the proposal and certain other supervisory factors. The Board has considered, among other things, confidential reports of examination, other confidential supervisory information received from the primary federal banking agency that supervises each institution, and public comments.¹¹

9. Under the DOJ Guidelines, 49 *Federal Register* 26,823 (1984), a market is considered highly concentrated if the post-merger Herfindahl–Hirschman Index (“HHI”) is more than 1800. The Department of Justice has informed the Board that a bank merger or acquisition generally will not be challenged (in the absence of other factors indicating anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI by more than 200 points. The Department of Justice has stated that the higher than normal HHI thresholds for screening bank mergers for anticompetitive effects implicitly recognize the competitive effects of limited-purpose lenders and other nondepository financial institutions.

10. On consummation of the proposal, NewAlliance would become the fifth largest depository institution in the Hartford banking market, controlling deposits of \$2 billion, which represents approximately 4.8 percent of total deposits in insured depository institutions in the market. The HHI would increase 5 points to 2355. These calculations use deposit and market share data as of June 30, 2003, and weight the deposits of thrift institutions, including Connecticut state savings banks, at 50 percent. The Board previously has indicated that thrift institutions have become, or have the potential to become, significant competitors of commercial banks. See *Midwest Financial Group*, 75 *Federal Reserve Bulletin* 386 (1989); *National City Corporation*, 70 *Federal Reserve Bulletin* 743 (1984); *First Hawaiian, Inc.*, 77 *Federal Reserve Bulletin* 52 (1991). The proportion of commercial and industrial lending engaged in by SBM, Tolland Bank, and two other Connecticut state savings banks operating in the Hartford banking market constitutes more than 10 percent of the total loan portfolio of each institution and is comparable with the proportion of commercial and industrial lending of commercial banks operating in the market. If these institutions were weighted at 100 percent while other thrifts were weighted at 50 percent, the HHI would increase by 22 points to 2104.

11. A commenter suggested that the conversion of NHSB from mutual to stock form would result in the sale of the institution to a

NHSB, SBM, and Tolland Bank are well capitalized and NewAlliance Bank would be well capitalized on consummation of the proposal. In addition, the Board has consulted with the FDIC, the primary federal supervisor of the relevant depository institutions, and the Connecticut Department of Banking concerning the proposal. Based on all the facts of record, the Board has concluded that considerations relating to the financial and managerial resources and future prospects of NewAlliance and the institutions involved in the proposal are consistent with approval, as are the other supervisory factors under the BHC Act.

Convenience and Needs Considerations

In acting on proposals under section 3 of the BHC Act, the Board is also required to consider the effects of the proposal on the convenience and needs of the communities to be served and to take into account the records of the relevant insured depository institutions under the CRA. In addition, the Board reviews the records of performance under the CRA of the relevant insured depository institutions when acting on a notice under section 4 of the BHC Act to acquire an insured savings association. The CRA requires the federal financial supervisory agencies to encourage financial institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation, and it requires the appropriate supervisory agency to take into account an institution’s record of meeting the credit needs of its entire community, including low- and moderate-income (“LMI”) neighborhoods, in evaluating depository institution expansionary proposals.

The Board has considered carefully the convenience and needs factor and the CRA performance records of NHSB, SBM, and Tolland Bank in light of all the facts of record, including public comments on the proposal. A commenter opposing the proposal alleged, based on data reported under the Home Mortgage Disclosure Act (12 U.S.C. § 2801 *et seq.*) (“HMDA”), that NHSB, SBM, and Tolland Bank disproportionately denied home mortgage credit to minorities in certain Metropolitan Statistical Areas (“MSAs”). In addition, the commenter expressed concern about possible branch closures and reductions in service after consummation of the proposal.¹²

larger banking organization. Any subsequent proposed acquisition of NewAlliance and NewAlliance Bank would be subject to approval by the appropriate federal and state banking agencies at that time under applicable law.

12. Another commenter urged the Board to require as a condition of its approval that NewAlliance increase the amount of interest it pays on certain client trust accounts maintained by attorneys for the benefit of their clients. The Board notes that NewAlliance has represented that it would review the amount of interest NewAlliance Bank would pay on those accounts after consummation of the proposal. Moreover, although the Board has recognized that banks can help to serve the banking needs of communities by making certain products or services available at certain rates, the CRA does not require an institution to provide any specific types of products or services or prescribe the costs charged for them.

A. CRA Performance Evaluation

As provided for in the CRA, the Board has evaluated the convenience and needs factor in light of examinations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.¹³

NHSB received an "outstanding" rating at its most recent CRA performance evaluation by the FDIC, as of July 8, 2002. NHSB's responsiveness to the credit needs of its community was found to be good. Examiners commended NHSB's record of home mortgage lending to borrowers of different income levels and its small business lending record. In addition, examiners commended the bank's record of community development lending and its level of qualified investments.

SBM received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of May 12, 2003. Examiners determined that SBM's CRA-related lending activities demonstrated a good responsiveness to the credit needs of its community and noted that SBM's home mortgage lending was particularly strong. In addition, examiners noted that SBM offered several flexible and innovative loan programs for individuals and small businesses. SBM also was found to have engaged in a significant level of qualified investments that benefited various programs, including affordable housing developments.

Tolland Bank received a "satisfactory" rating at its most recent CRA performance evaluation by the FDIC, as of November 15, 2001. Examiners commended Tolland Bank's record of CRA-related lending among borrowers of different income levels and business customers of different sizes. In addition, examiners noted that the percentage of home mortgage loans made by Tolland Bank to low-income borrowers in 1999 and 2000, and the percentage of such loans made by the bank in moderate-income communities in 2000, compared favorably with the percentages of these types of loans made by the aggregate lenders in the assessment area. Tolland Bank also was found to have provided strong retail banking and community development services.

NewAlliance has represented that the CRA policy of NewAlliance Bank would be modeled on the CRA policy of NHSB. The CRA record of NHSB indicates that NewAlliance has the experience and expertise to establish and implement appropriate CRA policies and programs at NewAlliance Bank. As part of its CRA program, NewAlliance has recently announced a five-year, \$27.5 million initiative to expand and develop affordable housing opportunities for LMI borrowers and in LMI communities.

13. See *Interagency Questions and Answers Regarding Community Reinvestment*, 66 *Federal Register* 36,620 and 36,639 (2001).

B. HMDA and Fair Lending Record

The Board also has carefully considered the lending records and HMDA data for NHSB, SBM, and Tolland Bank in light of comments received.¹⁴ One commenter alleged that NHSB disproportionately denied African-American and Hispanic applicants for home mortgage loans in the Connecticut MSAs of Bridgeport, New Haven, and New London.¹⁵ The commenter asserted that the denial disparity ratios for minority applications at NHSB¹⁶ were higher than for nonminority applicants in these MSAs, and that those ratios compared unfavorably with the denial disparity ratios for lenders in the aggregate ("aggregate lenders").¹⁷ The commenter also made the same allegations with regard to SBM's home purchase lending and criticized Tolland Bank's level of lending to minorities in the Hartford, Connecticut, MSA.

The 2001 and 2002 HMDA data indicate that NHSB and SBM had somewhat higher denial disparity ratios than aggregate lenders for total home mortgage lending to minority individuals in the Bridgeport, Hartford, New Haven, and New London MSAs. These data, however, indicate that NHSB and SBM demonstrated higher loan origination rates for mortgage loans to minority individuals in other areas. For example, NHSB's origination rate for HMDA-reportable loans to African-American and Hispanic applicants in New Haven exceeded the rate for aggregate lenders.¹⁸ In addition, the 2002 HMDA data indicate that NHSB's denial disparity ratio for Hispanic applicants for refinance loans in New Haven was less than the ratio for aggregate lenders. The 2002 HMDA data indicate that SBM's denial disparity ratio for African-American applicants for all HMDA-reportable loans in Hartford was less than the ratio for aggregate lenders in 2002. The HMDA data also indicate that SBM's denial disparity ratios decreased between 2001 and 2002 in HMDA-reportable lending to African-American and Hispanic applicants when compared with those ratios for aggregate lenders.

The 2001 and 2002 HMDA data indicate a low volume of applications by minority individuals at Tolland Bank. As previously noted, Tolland Bank would be merged into NewAlliance Bank on consummation of the proposal. NewAlliance has indicated that NewAlliance Bank would implement NHSB's current outreach program to minor-

14. The Board has reviewed HMDA data reported by NHSB, SBM, and Tolland Bank in 2001 and 2002 in the area cited by the commenter.

15. The commenter also expressed concern that NHSB's volume of applications by minority individuals compares unfavorably with the volume of these applications for aggregate lenders.

16. The denial disparity ratio equals the denial rate for a particular racial category (for example, African-American) divided by the denial rate for whites.

17. In this context, the lending data of the aggregate lenders represent the cumulative lending for all financial institutions that have reported HMDA data in a given area.

18. The origination rate equals the total number of loans originated to applicants of a particular racial category divided by the number of applications received by members of that racial category.

ity individuals and would modify outreach efforts as appropriate.

Although the HMDA data reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial groups in some areas, the data generally do not indicate that NHSB, SBM, or Tolland Bank are excluding any race or income segment of the population or geographic areas on a prohibited basis. The Board nevertheless is concerned when the record of an institution indicates disparities in lending and believes that all banks are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending, but also equal access to credit by creditworthy applicants regardless of their race, gender, or national origin. The Board recognizes, however, that HMDA data alone provide an incomplete measure of an institution's lending in its community because these data cover only a few categories of housing-related lending. HMDA data, moreover, provide only limited information about the covered loans.¹⁹ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has not assisted adequately in meeting its community's credit needs or has engaged in illegal lending discrimination.²⁰

Because of the limitations of HMDA data, the Board has considered these data carefully in light of other information, including examination reports that provide an on-site evaluation of compliance with fair lending laws by NHSB, SBM, and Tolland Bank. In the latest performance evaluations, examiners found no evidence of prohibited discrimination or other illegal credit practices or any substantive violations of fair lending laws at any of the institutions involved in the proposal.

The record also indicates that NHSB has taken a number of affirmative steps to ensure compliance with fair lending laws and, as previously indicated, would implement NHSB's compliance program as a model for NewAlliance Bank. NHSB has instituted compliance policies and procedures to help ensure compliance with all fair lending and other consumer protection laws and regulations, employed

officers and staff responsible for monitoring compliance, and conducted regular audits and reviews of compliance. As part of its compliance monitoring program, all denied loan applications are subject to a second-review process. In addition, NHSB has made efforts to increase its outreach to minority individuals by placing advertisements in Spanish-language newspapers and other publications serving minority communities. NewAlliance has stated that it would establish a self-assessment process for NewAlliance Bank, which would be reviewed by the compliance department. Moreover, NewAlliance's compliance and internal audit staff would conduct training programs and independent compliance reviews of each NewAlliance Bank business unit with respect to certain regulations, including consumer compliance and fair lending laws and regulations.

The Board also has considered the HMDA data in light of the overall lending and community development activities of NHSB, SBM, and Tolland Bank, which, as discussed above, show that all three institutions significantly assist in helping to meet the credit needs of their entire communities, including LMI areas. These established efforts demonstrate that the banks actively help to meet the credit needs of their entire communities.

C. Branch Closings

A commenter expressed concern about possible branch closures after the consummation of the proposal and subsequent merger of NHSB, SBM, and Tolland Bank. NewAlliance has represented that it would adopt NHSB's branch closure policies on consummation of the proposal and that any consolidations or branch closings would comply with this policy and all applicable rules and regulations. Moreover, NewAlliance has indicated that it would remain in each market currently served by NHSB, SBM, and Tolland Bank, and would not close any branches of any bank as part of the proposal's consummation. Examiners at NHSB's most recent CRA performance evaluation reported that the bank's branch network adequately served the retail banking needs of its assessment area.

The Board also has considered the fact that federal banking law provides a specific mechanism for addressing branch closings.²¹ Federal law requires an insured depository institution to provide notice to the public and to the appropriate federal supervisor before closing a branch. In addition, the Board notes that the FDIC, as the appropriate federal supervisor of NHSB, will continue to review its branch closing record in the course of conducting CRA performance evaluations.

19. The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applications than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. Credit history problems and excessive debt levels relative to income (reasons most frequently cited for a credit denial) are not available from HMDA data.

20. A commenter asserted, based solely on HMDA data and without providing any other supporting facts, that NHSB violated the Equal Credit Opportunity Act (15 U.S.C. § 1691) ("ECOA") and HMDA. In evaluating the convenience and needs factors, the Board has considered confidential supervisory information and detailed information submitted by NewAlliance regarding NHSB's fair lending policies and procedures and its plans to implement those policies at the combined institution. In addition, ECOA and HMDA provide that enforcement authority under those statutes is granted to the primary federal supervisor of the institution, which is the FDIC in this case. The Board has forwarded the comments to the FDIC, and the FDIC has ample authority to enforce these provisions if violations are found.

21. Section 42 of the Federal Deposit Insurance Act (12 U.S.C. § 1831r-1), as implemented by the Joint Policy Statement Regarding Branch Closings (64 *Federal Register* 34,844 (1999)), requires that a bank provide the public with at least 30 days' notice and the appropriate federal supervisory agency and customers of the branch with at least 90 days' notice before the date of the proposed branch closing. The bank also is required to provide reasons and other supporting data for the closure, consistent with the institution's written policy for branch closings.

D. Conclusion on Convenience and Needs Considerations

In reviewing the effect of the proposal on the convenience and needs of the communities to be served, the Board has carefully considered the entire record, including comments received and responses to the comments; evaluations of the performance of NHSB, SBM, and Tolland Bank under the CRA; and confidential supervisory information. The Board also considered information submitted by NewAlliance concerning the performance of NHSB, SBM, and Tolland Bank under the CRA since their last CRA performance evaluations and the policies and procedures in place to ensure compliance with fair lending laws, HMDA, and other applicable laws.

Based on all the facts of record, and for reasons discussed above, the Board concludes that considerations relating to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval of the proposal.

Other Considerations

As part of its evaluation of the public interest factors under section 4 of the BHC Act, the Board also has carefully reviewed the public benefits and possible adverse effects of the proposed acquisition of SBM. The record indicates that consummation of the proposal would result in benefits to SBM's consumer and business customers. The proposal would allow NewAlliance to provide customers of SBM, as well as those of Tolland Bank and NHSB, with access to a broader array of commercial banking products and services. Customers also would have access to expanded branch and ATM networks. Based on all the facts of record, the Board has determined that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects under the standard of section 4 of the BHC Act.

Conclusion

Based on the foregoing and in light of all the facts of record, the Board has determined that the applications and notice should be, and hereby are, approved.²² In reaching

this conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act and other applicable statutes. The Board's approval is specifically conditioned on compliance by NewAlliance with all the representations and commitments made in connection with this Order and the receipt of all other regulatory approvals. The Board's approval of the nonbanking aspects of the proposal also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c) of Regulation Y (12 C.F.R. 225.7 and 225.25(c)), and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. For purposes of this action the commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision and, as such, may be enforced in proceedings under applicable law.

The banking acquisition shall not be consummated before the fifteenth calendar day after the effective date of this order, and the proposal may not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston acting pursuant to delegated authority.

By order of the Board of Governors, effective February 25, 2004.

Voting for this action: Chairman Greenspan, Vice Chairman Ferguson, and Governors Gramlich, Bies, Olson, Bernanke, and Kohn.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

ORDERS ISSUED UNDER INTERNATIONAL BANKING ACT

Gjensidige NOR Sparebank ASA
Oslo, Norway

Order Approving Establishment of a Branch

Gjensidige NOR Sparebank ASA ("Bank"), Oslo, Norway, a foreign bank within the meaning of the International Banking Act ("IBA"), has applied under section 7(d) of

22. A commenter requested that the Board hold a public hearing on the proposal. Section 3 of the BHC Act does not require the Board to hold a public hearing on an application unless the appropriate supervisory authority for any of the banks to be acquired makes a timely written recommendation of denial of the application. The Board has not received such a recommendation from any appropriate supervisory authority. Under its rules, the Board also may, in its discretion, hold a public meeting or hearing on an application to acquire a bank if a meeting or hearing is necessary or appropriate to clarify factual issues related to the application and to provide an opportunity for testimony. 12 C.F.R. 225.16(e). In addition, section 4 of the BHC Act and the Board's rules thereunder provide for a hearing on a notice to acquire a nonbanking company if there are disputed issues of material facts that cannot be resolved in some other manner. 12 C.F.R. 225.25(a)(2). The Board has considered carefully the commenter's request in light of all the facts of record. In the Board's view, the public has had ample opportunity to submit comments on the pro-

posal, and in fact, the commenter has submitted written comments that the Board has considered carefully in acting on the proposal. The commenter's request fails to identify disputed issues of fact that are material to the Board's decisions that would be clarified by a public hearing or meeting. Moreover, the commenter's request fails to demonstrate why its written comments do not present its views adequately or why a meeting or hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public hearing or meeting is not required or warranted in this case. Accordingly, the request for a public hearing or meeting on the proposal is denied.

the IBA (12 U.S.C. § 3105(d)) to establish a branch in New York, New York. The Foreign Bank Supervision Enhancement Act of 1991, which amended the IBA, provides that a foreign bank must obtain the approval of the Board to establish a branch in the United States.

Notice of the application, affording interested persons an opportunity to comment, has been published in newspapers of general circulation in New York, New York (*New York Post*, July 18, 2003). The time for filing comments has expired, and all comments have been considered.

Bank, with total assets of \$37.3 billion, is the third largest bank in Norway.¹ It is a wholly owned subsidiary of DnB NOR ASA ("DnB NOR"), which was formed as a result of a merger in 2003 of Bank's former parent, Gjensidige NOR ASA, with DnB Holding ASA, all in Oslo. DnB NOR is the holding company for Norway's largest financial services group. The government of Norway controls approximately 31.3 percent of the shares of DnB NOR.² In addition, Stiftelsen Gjensidige NOR Sparebank (a savings bank foundation) controls 10.3 percent and Gjensidige NOR Forsikring (an insurance company) controls 5.4 percent of the shares of DnB NOR. No other shareholder controls more than 5 percent of DnB NOR's voting shares. DnB NOR provides a wide variety of financial services, including retail and corporate banking, insurance, brokerage services, and asset management. Bank is primarily engaged in retail and corporate banking and real estate brokerage services. DnB NOR and Bank are qualifying foreign banking organizations pursuant to Regulation K.

Bank currently has no operations in the United States. However, Den norske Bank ASA ("Den norske Bank"), also in Oslo and a wholly owned subsidiary of DnB NOR, operates a branch in New York. DnB NOR intends to merge Den norske Bank into Bank, with Bank as the surviving entity. Bank's proposed New York branch would assume the banking activities of Den norske Bank's New York branch, which include lending, letters of credit and overdraft facilities, foreign exchange transactions, cash management, and financial advisory services.

In order to approve an application by a foreign bank to establish a branch in the United States, the IBA and Regulation K require the Board to determine that the foreign bank applicant engages directly in the business of banking outside of the United States and has furnished to the Board the information it needs to assess the application adequately. The Board also shall take into account whether the foreign bank and any foreign bank parent is subject to comprehensive supervision or regulation on a consolidated basis by its home country supervisor (12 U.S.C.

§ 3105(d)(2); 12 C.F.R. 211.24).³ The Board may also take into account additional standards as set forth in the IBA and Regulation K (12 U.S.C. § 3105(d)(3)–(4); 12 C.F.R. 211.24(c)(2)–(3)).

As noted above, Bank engages directly in the business of banking outside the United States. Bank also has provided the Board with information necessary to assess the application through submissions that address the relevant issues.

With respect to supervision by home country authorities, the Board has previously determined, in connection with an election to be treated as a financial holding company, that another bank in Norway was subject to home country supervision on a consolidated basis.⁴ Bank is supervised by Norway's home country supervisor, Kredittilsynet, on substantially the same terms and conditions as that other bank. Based on all the facts of record, it has been determined that Bank is subject to comprehensive supervision on a consolidated basis by its home country supervisor.

The Board has also taken into account the additional standards set forth in section 7 of the IBA and Regulation K (*see* 12 U.S.C. § 3105(d)(3)–(4); 12 C.F.R. 211.24(c)(2)–(3)). Kredittilsynet has no objection to the establishment of the proposed branch.

Norway's risk-based capital standards are consistent with those established by the Basel Capital Accord. Bank's capital is in excess of the minimum levels that would be required by the Basel Capital Accord and is considered equivalent to capital that would be required of a U.S. banking organization. Managerial and other financial resources of Bank also are considered consistent with approval, and Bank appears to have the experience and capacity to support the proposed branch. In addition, Bank has established controls and procedures for the proposed branch to ensure compliance with U.S. law, as well as controls and procedures for its worldwide operations generally.

Norway is a member of the Financial Action Task Force and subscribes to its recommendations on measures to combat money laundering. In accordance with these recommendations, Norway has enacted laws and created legislative and regulatory standards to deter money laundering.

3. In assessing this standard, the Board considers, among other factors, the extent to which the home country supervisors:

- (i) ensure that the bank has adequate procedures for monitoring and controlling its activities worldwide;
- (ii) obtain information on the condition of the bank and its subsidiaries and offices through regular examination reports, audit reports, or otherwise;
- (iii) obtain information on the dealings with and relationship between the bank and its affiliates, both foreign and domestic;
- (iv) receive from the bank financial reports that are consolidated on a worldwide basis or comparable information that permits analysis of the bank's financial condition on a worldwide consolidated basis;
- (v) evaluate prudential standards, such as capital adequacy and risk asset exposure, on a worldwide basis. These are indicia of comprehensive, consolidated supervision. No single factor is essential, and other elements may inform the Board's determination.

4. *See* Board Letter dated November 19, 2003, to Robert D. Webster, Esq.

1. Asset data are as of September 30, 2003.

2. In accordance with a decision by the Norwegian Parliament, the government is expected to increase its ownership interest to 34 percent by the end of 2004. The government holds its interest through a separate legal entity, the Government Bank Investment Fund ("Fund"). The Fund was established in 1991 as part of a package of measures intended to resolve Norway's banking crisis. The government intends to dissolve the Fund in 2004, after which the government's interest in DnB NOR will be held by Norway's Ministry of Trade and Industry.

Money laundering is a criminal offense in Norway, and financial institutions are required to establish internal policies, procedures, and systems for the detection and prevention of money laundering throughout their worldwide operations. Bank has policies and procedures to comply with these laws and regulations. Bank's compliance with applicable laws and regulations is monitored by Bank's auditors and Kredittilsynet.

With respect to access to information about Bank's operations, the Board has reviewed the restrictions on disclosure in relevant jurisdictions in which Bank operates and has communicated with relevant government authorities regarding access to information. Bank and its ultimate parent, DnB NOR, have committed to make available to the Board such information on the operations of Bank and any of its affiliates that the Board deems necessary to determine and enforce compliance with the IBA, the Bank Holding Company Act, and other applicable federal law. To the extent that the provision of such information to the Board may be prohibited by law or otherwise, Bank and its ultimate parent have committed to cooperate with the Board to obtain any necessary consents or waivers that might be required from third parties for disclosure of such information. In addition, subject to certain conditions, Kredittilsynet may share information on Bank's operations with other supervisors, including the Board. In light of these commitments and other facts of record, and subject to the condition described below, it has been determined that Bank has provided adequate assurances of access to any necessary information that the Board may request.

On the basis of all the facts of record, and subject to the commitments made by Bank and its ultimate par-

ent, as well as the terms and conditions set forth in this order, Bank's application to establish a branch is hereby approved.⁵ Should any restrictions on access to information on the operations or activities of Bank and its affiliates subsequently interfere with the Board's ability to obtain information to determine and enforce compliance by Bank or its affiliates with applicable federal statutes, the Board may require termination of any of Bank's direct or indirect activities in the United States. Approval of this application also is specifically conditioned on compliance by Bank with the commitments made in connection with this application and with the conditions in this order.⁶ These commitments and conditions are deemed to be conditions imposed in writing by the Board in connection with this decision and, as such, may be enforced in proceedings under applicable law against Bank and its affiliates.

By order, approved pursuant to authority delegated by the Board, effective January 16, 2004.

ROBERT DEV. FRIERSON
Deputy Secretary of the Board

5. Approved by the Director of the Division of Banking Supervision and Regulation, with the concurrence of the General Counsel, pursuant to authority delegated by the Board.

6. The Board's authority to approve the establishment of the proposed branch parallels the continuing authority of the State of New York to license offices of a foreign bank. The Board's approval of this application does not supplant the authority of the State of New York to license the proposed office of Bank in accordance with any terms or conditions that it may impose.